THE ADVOCATE

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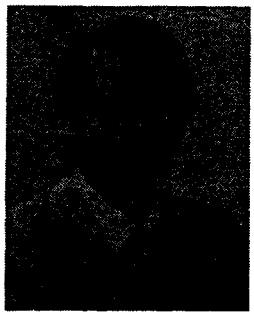
Drugs and Their Effects

Crime, Punishment and Public Opinion
Corrections: Populations and Trends
Capital Sentencing Based on Race

The Advocate Features



Bill Stewart

Bill Stewart, of the Department's Protection & Advocacy Division, is supervisor of the mental health branch which serves children or adults who have been placed in mental hospitals. Bill says that the popular media have traditionally promoted myths about the mentally ill, "What I call the Halloween II slasher myth." If a client is dangerous and meets other criteria he wants that person off the street, but he adds he's met very few individuals who meet that criteria. Society attempts to remove people from the streets who are eccentric or public nuisances simply because they act strange, he says.

Bill's attitude is, "Isn't it a wonderment - the many ways people see the world versus the way I see it? People called mentally ill are the most amazing people and do the most creative work I've even seen." He points to clients' art that he displays in his office. Bill really enjoys spending time with his clients and being allowed to see into their world view. He advocates strongly for their right to respect for their world view because "our clients are people first and foremost." His approach to his clients typically is, "Please understand that your reality and mine are different. Most people have said to you, 'you're crazy', but I respect your view. What then can I do for you as an advocate?"

Overall society is not kind to persons who see the world differently. "They are treated as less than human, locked up, tied up, and medicated." Bill has seen clients die in jail because they are so frail and vulnerable to others. He observed that the system has failed to do as it should for his clients. When he sees that happen, he steps in and insists on behalf of that client that adequate services be provided and the client be placed in the "least restrictive setting."

Bill takes directions from his clients. Sometimes that means discharge from the mental hospital because the client doesn't meet the restrictive standard. He admits often the client will receive inadequate support in the community because the "follow-up" is self-determined by the client. If the mentally ill person could receive adequate community help it would be the best solution for the person and society. Discharge from a mental hospital is also cost-effective as it costs between $55-60 thousand yearly to hospitalize a mentally ill person. Bill says it is a credit to our society if we can allow for differences rather than saying "you act funny, you need to be locked up."

Ethical problems do arise. Bill withdraws from the cases when his ethical beliefs differ substantially from the client's requested service. On the issue of forced medication, even though the person is clearly doing better on medication, Bill will advocate for their right to refuse because medicines have

Continued on Page 52

"A Song to Loafing"

Laws that criminalize wandering, being on the streets, loitering or not having a job, are, in the rubric of constitutional law, "void for vagueness." They fail to give fair notice of what behavior is forbidden, and they encourage arbitary and erratic arrests and convictions. They are indefinite by design to allow the police to catch people who are thought undesirable but who have done no wrong and are not chargeable with any particular offense.

Loafing and loitering, like privacy and many other rights we take for granted, are not specifically mentioned in the Constitution, but they are protected by it. They give value and meaning to life and nurture our sense of independence, self-confidence and creativity. "These amenities," wrote Justice William O. Douglas in declaring unconstitutional a Jacksonville, Florida vagrancy ordinance, "have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness."

Wanderers and loafers may be bad for the downtown convention trade, but they have an honored place in our culture. Walt Whitman was a great loafer who loved the open road. "I loaf and invite my soul, I lean and loaf at my ease observing a spear of summer grass," he wrote in "Song of Myself."

—Laughlin McDonald, director of the ACLU's Southern Regional Office. Excerpted from an article he wrote for *The Atlanta Constitution* opposing a plan to "clean up" downtown Atlanta by getting rid of "street persons, transients, hangers-on."

From the Editor:

What we think the public believes about crime and punishment often varies from what they actually believe. We've an article to help us understand what people do think.

Corrections in Kentucky is in crisis. We've statistics from Corrections that portend an ominous future. We also have an article on a Kentucky study that demonstrates that the color of a person's skin determines life or death.

Our cover story deals with some facts about drugs and their consequences, and about new and more severe drug penalties.

We remember James Jernigan, a man who was a Kentucky fighter for freedom.

ECM

THE ADVOCATE

The Advocate is a bi-monthly publication of the Department of Public Advocacy. Opinions expressed in articles are those of the authors and do not necessarily represent the views of the Department.

The Advocate welcomes correspondence on subjects treated in its pages.

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IN THIS ISSUE

CRIME, PUNISHMENT AND PUBLIC OPINION

EDITOR'S NOTE: Reprinted with permission of The Sentencing Project, 1156 Fifteenth Street, N.W., Suite 520, Washington, D.C. 20005.

Recent surveys of public opinion on crime and punishment contain important information for public defenders. The surveys yield some surprising results with implications for sentencing advocacy.

Some of the most significant findings of the recent public opinion polls are the following:

* The public believes that prisons should be more rehabilitative and less punitive than has been commonly assumed.

* Once informed about the costs and effectiveness of prisons and alternatives to incarceration, the public becomes very supportive of alternatives.

* Even though public officials and criminal justice personnel -- including legislators and judges -- share the public's attitude in support of rehabilitation, the same officials erroneously perceive the public to be more punitive and less receptive to alternatives than is actually the case. This misperception may cause public officials to oppose reforms that the public might support if given the opportunity.

* Public officials are reasonably well informed about some aspects of the criminal justice system, but they are strikingly misinformed about others. Their misinformation is the sort which may discourage support for alternatives.

Public Attitudes on Crime, Courts, and Prisons

A 1986 report by The Public Agenda Foundation (PAF), Crime and Corrections: A Review of Public Opinion Data Since 1975, reviewed public opinion data from polls conducted since 1975. The report documents the prominence (though not dominance) of crime as an issue of public concern. It states that while polls show that the public believes courts are "too lenient on criminals," the public also believes poverty and unemployment are more significant as causes of crime. The report documents a lack of confidence in plea bargaining and in the courts themselves, exceeded only by the even greater lack of faith in prisons.

The PAF report also documents public attitudes toward prison. It notes that, to an unusual degree, answers to questions about the goals of prisons are influenced by the wording of the questions in different polls. Gallup and other polls show an almost equal public commitment to stiffer sentences and to stronger rehabilitative programs for offenders. But surveys also show that most people believe incarceration fails to rehabilitate. They indicate that people are generally reluctant to spend tax monies on prisons, particularly if given a choice of spending money on police, aid to dependent children, or job creation programs.

A second report by the Public Agenda Foundation published by The Edna McConnell Clark Foundation in 1987, Crime and Punishment: The Public's View, used in-depth focus group discussions to explore underlying public perceptions and sentiment. One conclusion of the report is that the public believes the primary goal of the criminal justice system should be to prevent crime before it happens. The PAF analysts contrast this with the focus of justice professionals on responding to crime after it occurs.

People in the focus groups wanted prisons to be "corrective," not instruments of vengeance, but they did not believe that prisons do much to "correct." While people understand that overcrowding decreases opportunities for rehabilitation, they do not

know the full extent of overcrowding in today's prison systems and its impact on any prospect for achieving rehabilitation. When informed of the effects of overcrowding--prison violence, suicides, idleness -- people become quite concerned about this problem.

Alternative to Incarceration

Focus groups favored alternatives to incarceration not so much as a means of reducing overcrowding but because they believed prisons fail to accomplish their objectives. When given the facts from actual cases, including a multiple vehicular homicide, participants favored alternatives such as community service, restitution, and drug treatment. Somewhat inconsistently, the report notes that focus groups would have excluded violent as well as repeat offenders and drug dealers from alternative sanctions. Focus group participants apparently defined "violent offenders" by the charge placed against them, rather than a profile of individual character.

Results from several other recent polls -- in North Carolina, South Carolina, Ohio and nationally -- are reported by Russ Immarigeon in an article, "Surveys Reveal Broad Support for Alternative Sentencing" (The National Prison Journal, Fall 1986), to show public support for alternatives to prison for non-violent offenders. One poll, undertaken for the north Carolina Center on Crime and Punishment (Hickman-Maslin Research, Confidential Analytical Report), found strong support for alternatives for non-violent first-time offenders in the state. The poll found, though, that this support fell off rapidly for more serious offenses, including possession of stolen goods, breaking and entering a house or store, and embezzling a large amount of money.

The North Carolina survey further investigated survey respondents' opinions about alternatives after informing them about prison conditions, the cost of incarceration, and alternative programs. The poll found that particularly after being informed of the costs of prison construction and operation, support for community (alternatives) sentencing rose more than 25 percent. Moreover, once informed, respondents tended to favor alternatives for repeat offenders as well as first-time offenders.

Policymakers' Attitudes and Perceptions

Polls and studies also reveal that in the area of criminal justice, public officials do not accurately perceive public opinion. This was demonstrated quite clearly in a report by researchers Stephen D. Gottfredson and Ralph B. Taylor, "Public Policy and Prison Populations," (Judicature, October-November 1984), based on a study of corrections reform efforts in Maryland in 1980. They found that the public, "contrary to general belief" was not especially punitive, but instead supported the goal of rehabilitation along with deterrence and incapacitation. Further, the public and policymakers' attitudes were similar "almost without exception." But policymakers incorrectly perceived public attitudes to be punitive and, echoing what they erroneously assumed to be public opinion, opposed reform initiatives in Maryland.

A 1985 study by the Michigan Prison and Jail Overcrowding Project reached similar conclusions about decision-makers in that state (Perception of Criminal Justice Surveys). When Michigan decision-makers were asked to estimate public support for alternatives, they grossly underestimated that support to be 12 percent, compared to the actual level of 66 percent. Of the professional groups themselves, defense attorneys and alternatives program service providers strongly favored alternatives, and were closer than other groups to the attitudes of the general public.

As in Maryland, decision-makers in Michigan may have developed overly punitive policies based on an incorrect assessment of public opinion. It appears that in both states, a base for reform existed which could have been used by political leaders to develop creative responses to crime and justice issues.

The Michigan study also demonstrated that state decision-makers lack certain knowledge about their own criminal justice system. When Michigan decision-makers were asked to provide estimates of key facts, such as the amount of reported felony crime which resulted in arrest, conviction, and jail/prison sentences, their estimates were frequently quite inaccurate. In other areas, such as the number of felony convictions leading to prison sentences and the number of trials versus pleas, the decision-makers were much better informed. While decisionmakers were knowledgeable about their own areas of the criminal justice system, the researchers concluded that, across groups, "it appears that decision-makers have grossly overestimated the effectiveness of the criminal justice system and its impact upon crime."

The researchers also noted that decision-makers "overestimated the proportion of all crime that is violent or person-related." This kind of information suggests that decision-makers are misinformed in ways which may bias them against alternative sentencing programs and reforms which reduce reliance on incarceration. If, as polls indicate, people are opposed to alternatives for "violent" offenders, it is likely that the decision-makers who over-estimate the amount of violent crime will be less inclined to support alternatives legislation for any class of offenders than they would if correctly informed.

Implications for Public Defenders

These public opinion surveys offer important information for defense attorneys that should be used for sentencing planning and advocacy for alternatives to incarceration. Among the most significant issues are the following:

1. Relatively weak public support for incarceration. The surveys show that the public wants prisons to both punish and rehabilitate, yet clearly believes that prisons don't rehabilitate. The challenge in proposing alternatives to incarceration, therefore, is to demonstrate that they are much more effective at rehabilitation (or at least providing rehabilitative services) and incorporate punitive aspects as well (community service, restitution, intensive supervision, etc.)

2. Limited cost-benefits of prison. Polls show that the public is reluctant to spend money on prisons when compared to a range of other options, including police services, welfare benefits, and job creation. The exorbitant costs of prison construction (over $50,000 a cell) and incarceration (about $20,000 a year) should be compared to other social services and the costs of alternatives to incarceration.

3. Individualized support for alternatives. Public support for alternatives to incarceration is much greater when discussed in terms of individual defendants and victims than in the abstract. Thus, given the facts of an individual case, people may support an alternative sentencing plan that they might oppose if just asked about a particular charge and its appropriateness for alternatives. This may enable defense attorneys and sentencing-program staff to succeed on a case-by-case basis even when the public seems hostile to non-incarcerating sentences.

4. Policymaker and judicial support for alternatives. Although there are a variety of attitudes toward prisons and alternatives, both the public and political/judicial leaders generally are receptive to alternatives in certain cases. Unfortunately, public leaders often oppose alternatives because they believe, incorrectly, that the public is not supportive of them. Judges and legislators need to be convinced that public support for alternatives and the concept of rehabilitation does exist and needs to be discussed in ways that can increase their appeal. If this is successful, then support for alternatives in individual sentencings will be much easier to achieve.

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MOTIONS COLLECTED, CATEGORIZED, LISTED

The Department of Public Advocacy has collected many motions filed in criminal cases in Kentucky, and has compiled an index of the categories of the various motions, and a listing of each motion. Each motion is a copy of a defense motion filed in an actual Kentucky criminal case.

COPIES AVAILABLE

A copy of the categories and listing of motions is free to any public defender or criminal defense lawyer in Kentucky. Copies of any of the motions are free to public defenders in Kentucky, whether full-time, part-time, contract, or conflict. Criminal defense advocates can obtain copies of any of the motions for the cost of copying and postage.

HOW TO OBTAIN COPIES

If you are interested in receiving an index of the categories of motions, a listing of the available motions, or copies of particular motions, contact:

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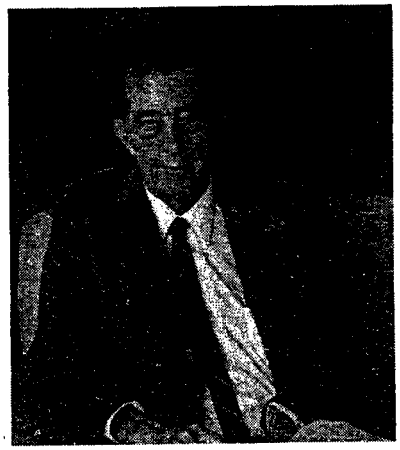
In Memoriam



July 22, 1988

Gentlemen:

I am writing this letter to inform you of the death of my husband, **James C. Jernigan**, on July 8, 1988.

As most of you know, the people of Monroe County and the state of Kentucky, lost a champion. He always enjoyed working with Gail Robinson, Kevin McNally and others in the Department of Public Advocacy, and he appreciated so very much the fine feature article written by Cris Brown in the February, 1985 issue of The Advocate. She managed to get so close to his inner person in such a short time, and it would please her to know that excerpts from her article were read in the eulogy at his funeral service.

If I can ever be of any help to you in any way here in Monroe County, please let me know.

Sincerely,
Patsy (Mrs. James C.) Jernigan
Tompkinsville, KY 42167

Man arrested for advice he gave son

NEW PORT RICHEY, Fla. — A father has been charged with child abuse for urging his 12-year-old son to defend himself with a baseball bat against bullying from a bigger neighborhood youth, police said. The 12-year-old hit the other boy three times with the bat, leaving bruises on the thigh and shin the size of silver dollars, authorities said. Woodie Harrell is charged with abusing the other child, not his own. "He's been picking on my kid for weeks," said Harrell, 39. "My kid beat him up because I told him to protect himself—and now I'm arrested." He said his son is about 4-foot-6 and weighs 60 pounds and that the other boy is about 5-foot-6 and weighs roughly 130.

Protection and Advocacy

In response to the Supreme Court decision in Smith v. Robinson, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed. 2d 746 (1984), Congress enacted the Handicapped Children's Protection Act (HCPA) in 1986 to allow attorney's fees to prevailing parents in actions under the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. 1400 et. seq. Congress began working on this legislation shortly after the Smith decision which held that fees were not awardable in special education litigation. Two issues which delayed passage of HCPA were whether fees would be awardable for work done in the mandatory administrative proceedings and whether fees would be awardable at "prevailing rates" for publicly funded attorneys.

The Sixth Circuit recently addressed both of these issues in Eggers v. Bullitt County School District, Action #87-6131 (8/18/88), and concluded that fees are awardable in EAHCA proceedings for administrative work even when the merits of the case are not litigated. In so holding, the court distinguished the Supreme Court decision in North Carolina Department of Transportation v. Crest Street Community Council, Inc., 479 U.S. 6, 107 S. Ct. 336, 93 L.Ed.2d 188 (1986) and relied on New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980). The Court noted that reliance on Carey was appropriate because of the mandatory nature of the administrative proceedings under the EAHCA and the plain language and the legislative history of HCPA. The Sixth Circuit also reviewed the issue of awards to publicly funded agencies and concluded that fees were awardable without regard to the employment status of counsel.

In the trial court, Protection and Advocacy had been denied fees because the court considered it "to be an anomaly to award attorney's fees to a state agency which is publicly funded and charged with the responsibility to do just exactly what it did." The court continued by noting that "(t)his anomaly is particularly evident when the entity against which the ...fees are awarded is also a publicly funded agency and an arm of the Commonwealth." The Sixth Circuit reversed the trial court holding on this issue, ruling that "(n)othing in the legislative history or the language of the statute was meant to exclude state-funded entities."

The Eggers were represented by Ava Crow and Sammie Lambert of Protection and Advocacy. Additionally, a number of out-of-state amici provided excellent briefs in support of the Eggers' position.

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Disability Rights Guide:
Practical solutions to problems affecting people with disabilities

This new publication by Washington, D.C. attorney Charles D. Goldman answers questions about rights for persons who have a disability or who work with disabled persons. It provides the conceptual legal framework and ways to solve problems created by attitudinal barriers, employment, architectural accessibility, housing, education and transportation. The appendices include a directory of relevant state laws, key contact points in the state and federal systems and information sources on AIDS.

The *Disability Rights Guide* is available for $14.95 at booksellers or $16.95 from Media Publishing, 2440 O Street, Suite 202, Lincoln, NE 68510. For further information contact Jerry Kromberg or Shirley Maly at Media Publishing (402) 474-2676.

The Supremes In '89: Preview of Criminal Issues Facing Court

The following list represents the cases of importance to public defenders which are currently under consideration in the U.S. Supreme Court. Generally, cases raising issues solely concerning interpretation of federal statutes or rules (except habeas corpus) are not included. Nor are cases raising civil rights or prison issues.

Remember Griffith v. Kentucky (1987), 479 U.S. ___, 107 S.Ct. 708, 93 L.Ed.2d 649 holds that new constitutional rules apply retroactively to all cases, state and federal, which are pending direct review, even if the rule is a "clear break" with prior precedent. However, the error must be preserved by appropriate motion or objection. Knowledge of cases the U.S. Supreme Court is considering, thus, may give you a leg up on the prosecution and may provide your client with an "insurance policy" in the event he/she is convicted.

The Court went on summer recess in July. They will reconvene on October 3, 1988. At that time they will begin hearing argument on the following cases. Decisions in these cases can be expected in the spring of 1989.

Death Penalty

Dugger v. Adams, Cause No. 87-121
(1) Whether advisory capital sentencing jury may be told that their sentencing decision is a recommendation only? (2) Has court below misapplied Reed v. Ross to justify its review of procedurally barred claim? (3) Should Reed v. Ross be overruled or limited so as to avoid turning each new decision emanating from this Court into cause and prejudice for ignoring otherwise valid procedural bar?

Tompkins v. Texas, Cause No. 87-6405
Must court instruct on lesser included offenses in a capital case where the evidence which supports the giving of such an instruction does not emanate from the defendant's own evidence? [Court also accepted review on a jury selection issue raised by this case.]

High v. Zant, Cause No. 87-5666
Whether execution of person who was 17 years old at the time of offense violates Eighth Amendment ban on cruel and unusual punishment?

Wilkins v. Missouri, Cause No. 87-6026
Whether execution of person who was 16 years old at the time of offense violates Eighth Amendment ban on cruel and unusual punishment?

Penry v. Lynaugh, Cause No. 87-6177
(1) At punishment phase of Texas capital murder trial, must trial court upon proper request (a) instruct jury that they are to take into consideration all evidence that mitigates against sentence of death, and (b) define terms in three statutory questions in such way that in answering these questions all mitigating evidence can be taken into account? (2) Is it cruel and unusual punishment to execute individual with reasoning capacity of seven-year-old?

Double Jeopardy

United States v. Halper, Cause No. 87-1383
Whether double jeopardy clause is violated where civil penalty is imposed upon a defendant for the same conduct he has already been convicted and punished for under criminal statute?

Federal Habeas Corpus

Zant v. Moore, Cause No. 87-1104

(1) What type of proof establishes "new law exception" to abuse of writ doctrine, sufficient to excuse habeas petitioner's failure to assert claim in prior federal habeas corpus petition? (2) What sort of proof establishes that "ends of justice" would be served by relitigating death penalty sentencing phase claims previously adjudicated adversely to habeas petitioner?

Castille v. Peoples, Cause No. 87-1602

Whether habeas petitioner has exhausted state remedies where he files a pro se petition to state court, styled as a request for counsel, which functioned as a petition for allocatur and thus gave the state supreme court an opportunity to rule on the merits.

Federal Sentencing Guidelines

United States v. Mistretta, Cause No. 87-1904

Whether federal sentencing guidelines issued by U.S. Sentencing Commission are unconstitutional (1) as a violation of the separation of powers doctrine, or (2) as an improper delegation of legislative authority? If the sentencing guidelines are invalid, are the 1984 amendments to the statutes which govern parole/good time status severable?

Free Speech

Massachusetts v. Oakes, Cause No. 87-1651

Whether entire criminal statute must be invalidated as being unconstitutionally overbroad where it could possibly be applied to criminalize conduct of a parent's photographing a naked infant. Here, defendant was convicted for action of photographing barebreasted 15-year-old stepdaughter.

Jury Issues

Blanton v. North Las Vegas, Nevada, Cause No. 87-1437

Whether misdemeanor offense of driving under the influence is serious crime such that the defendant has a right to a jury trial?

Jury Selection

Teague v. Lane, Cause No. 87-5259

(1) Does fair cross-section requirement of Sixth Amendment prohibit prosecution's racially discriminatory use of peremptory challenges? (2) Should decision in Batson v. Kentucky be applied retroactively to all convictions not final at time certiorari was denied in McCray v. New York (1983), 461 U.S. 961, in order to correct inequity and confusion resulting from intentional postponement of reexamination of Swain v. Alabama (1965), 380 U.S. 202? (3) Does defendant overcome presumption of correctness of prosecution's proper use of its peremptory challenges, as recognized in Swain, where examination of prosecutor's volunteered reasons for its exercise of its challenges to exclude black jurors demonstrates that prosecution has engaged in discrimination?

Tompkins v. Texas, Cause No. 87-6405

Whether lower court applied proper standard when it determined that a reasonable trier of fact could have determined that prosecutor dismissed all blacks from the jury for reasons other than racial bias? [Court also accepted review on another issue raised by this case; see description under "Death Penalty" section.]

Lesser Included Offenses

Schmuck v. United States, Cause No. 87-6431
Is the defendant entitled to an instruction on a lesser included offense only when all elements of the lesser offense are included in elements of the greater offense? (Here, the defendant was refused instruction on lesser offense which he argues led to conviction on greater offense.)

Procedural Default

United States v. Broce, Cause No. 87-1190
Is defendant who pleads guilty to indictments alleging two different criminal conspiracies, as part of plea bargain in which government agrees not to prosecute him on other charges, entitled to factual determination of his contention, raised for first time in later collateral attack on his sentences, that two conspiracies alleged were actually single conspiracy?

Right to Counsel

Penson v. Ohio, Cause No. 87-6116
(1) Can appellate counsel's failure to file brief on direct appeal be considered non-prejudicial or harmless error? (2) When state court of appeals found that there were arguable issues that could be raised on appeal, was court of appeals required to afford petitioner assistance of counsel before reviewing his case and affirming his conviction? (3) Were petitioner's rights to equal protection, due process, and effective assistance of counsel on his appeal of right denied when state court of appeals permitted petitioner's counsel to withdraw, subsequently found arguable issues in his appeal, but refused to appoint new counsel for him, and only considered arguable issues raised in appeals of petitioner's co-defendants?

Perry v. Leeke, Cause No. 87-6325
Is harmless error analysis appropriate where there is a denial of counsel during the course of a criminal trial? (Here, the court refused to allow defense counsel to confer with the defendant between his direct and cross-examination.)

Search & Seizure

Florida v. Riley, Cause No. 87-764
Does defendant have a reasonable expectation of privacy in residential backyard such that ground observations from helicopter 400 feet above the ground violates the Fourth Amendment?

U.S. v. Sokolow, Cause No. 87-1295
Whether an investigative detention under Terry v. Ohio can be based solely upon "probabilistic evidence" that attempts to identify travelers as drug couriers (i.e., "drug courier profile")?

State's Failure to Preserve Evidence

Arizona v. Youngblood, Cause No. 86-1904
Whether the state's failure during investigation of sexual assault upon child, to preserve samples of seminal fluid and to perform tests on those samples denied defendant due process?

Sufficiency of the Evidence

Lockhart v. Nelson, Cause No. 87-1277

After appellate court holds that certain evidence was improperly admitted against defendant, should court determine sufficiency of state's case by considering all state's proof that was admitted into evidence or by considering only remainder of state's proof that had been properly admitted into evidence?

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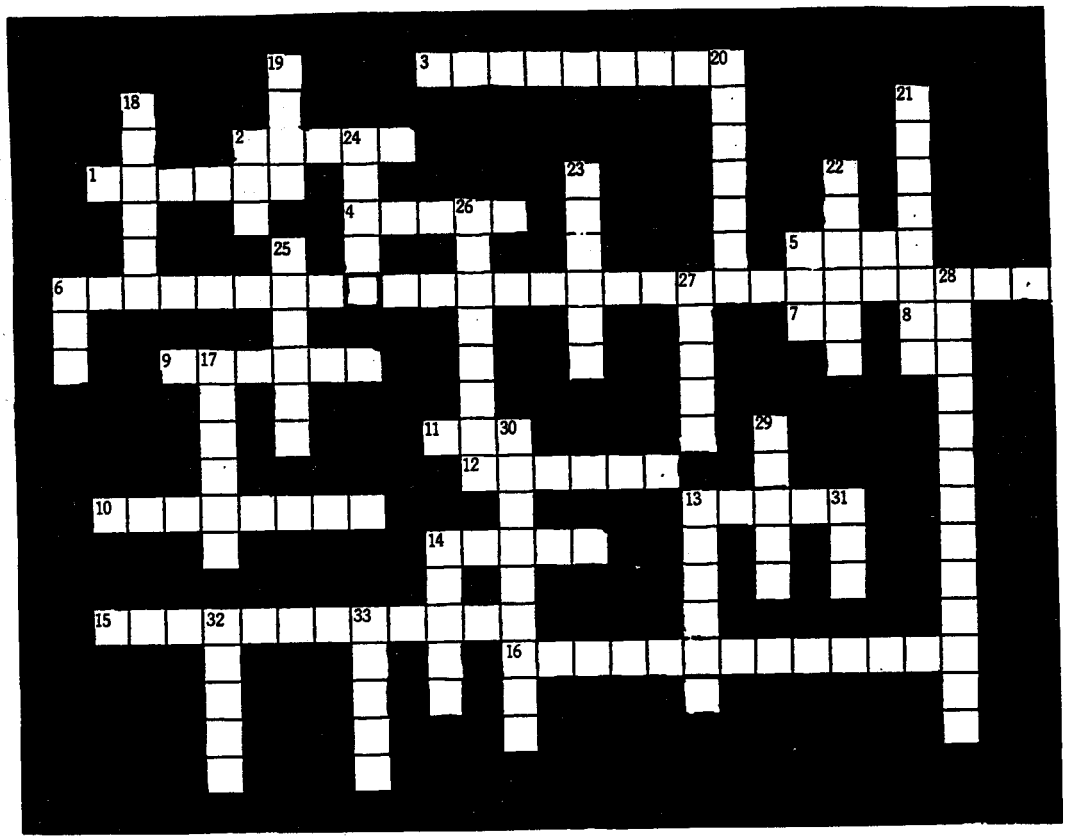
CROSS-EXAMINATION

Courtesy of
Bette Niemi



Across

1. To set free
2. Sense missing justice
3. Peremptorily speaking
4. 1st degree burglaries were usually committed at this time prior to 1980
5. Unconstrained
6. 1986 Ky. State Pen. riot
7. In the matter of
8. Former wife or convict
9. As in sex, or, once as a matter of right
10. Temporary release
11. Sentencing document
12. Confidential and reliable
13. Increasingly harmless
14. Usually red, occassionally blue in legal professional
15. Defense counsel misconduct
16. Now for then

Down

2. Judicial posture
5. Not against
6. A "pretty flying object" or aggravated offender
13. Early release
14. Ky. voter (non-hispanic)
17. Early release (another form)
18. To deny a prior truth
19. Judicial directive to perform
20. Degree of emotional disturbance
21. What Diana Ross and appeals have in common
22. Condition of intensive supervision
23. _____ the Court's discretion
24. Divided jury
25. Truth and sentencing
26. Prosecutorial misconduct
27. Question of fact
28. After the fact
29. Shopping prohibited
30. Lost with age, presumed by law
31. To beat, or, type of partner
32. . . . But not necessarily true
33. Often by error

Editor's Note: The first 3 correct answers received by November 15th will receive a free DPA t-shirt.

West's Review

A Review of the Published Opinions of the
Kentucky Supreme Court
Kentucky Court of Appeals
United States Supreme Court

Linda K. West

Kentucky Court of Appeals

FOURTH DEGREE ASSAULT-RECKLESSNESS
Casey v. Commonwealth
35 K.L.S. 9 at 8
(July 8, 1988)

The Court reversed Casey's conviction of fourth degree assault based on the insufficiency of the evidence. Casey struck a police officer while driving. The officer had stopped his cruiser in the right-hand lane of a two lane highway with the headlights on bright and the blue lights flashing. The officer then stood in the left-hand lane. Casey testified that he struck the officer because he did not see anything beyond the field of light created by the cruiser. The evidence supported the inference that Casey did not stop or slow down before passing the cruiser. The Court held that regardless of whether Casey's conduct might be considered negligent in the civil sense, it did not constitute a "gross deviation from the standard of care that a reasonable person would observe..." and therefore was neither reckless nor wanton as required for a conviction of fourth degree assault. See KRS 501.020(3) and (4).

CORRECTION OF ERRONEOUS SENTENCE
Skiles v. Commonwealth
35 K.L.S. 9 at 11
(July 15, 1988)

Skiles plead guilty to drug trafficking charges in exchange for a sentence to the statutory minimum of ten years. The sentencing court however, erroneously entered a judgment fixing Skiles' sentence at five years imprisonment. The court subsequently entered an amended judgment fixing punishment at ten years. Skiles appealed.

The Court of Appeals held that imposition of the amended sentence did not offend the Double Jeopardy Clause. The Court also noted that "[t]he rule that a trial court which has imposed an unlawful sentence can correct that sentence at any time appears to be the majority position in those jurisdictions which have considered the matter." The Court upheld the amended judgment.

COMBINED TIS/PFO SENTENCING/
PAROLE HISTORY
Lemon v. Commonwealth
35 K.L.S. 9 at 14
(July 22, 1988)

The Court rejected argument that a combined Truth in Sentencing (TIS) and PFO hearing violated due process without the introduction of some specific, incompetent evidence. The Court cited Commonwealth v. Reneer, Ky., 734 S.W.2d 794, 798 (1987) as approving combined TIS/PFO hearings "because the same evidence that is pertinent toward fixing the penalty is also pertinent for consideration in the enhancement of sentence...." The Court also rejected argument that evidence of Lemon's parole and probation history, introduced as part of the TIS hearing, was prejudicial to his PFO sentencing. The Court noted that Lemon had testified during the guilt phase that he had "just got out of prison," and that the alleged error was unpreserved.

PROCEDURE TO CONTEST DENIAL
OF CREDIT FOR TIME SERVED
Maynard v. Commonwealth
35 K.L.S. 9 at 17
(July 29, 1988)

The trial court in this case entered a judgment which failed to give Maynard credit for jail time. Maynard did not appeal the judgment but instead filed a CR 60.02 motion requesting credit for time served. Maynard appealed from the denial of this motion.

The Court held that "the proper remedy in this case was by direct appeal, an avenue which was available to the appellant despite his guilty pleas." "As the issue could have been raised on direct appeal, it could not properly be raised in a CR 60.02 motion." Judge Miller dissented.

ESCAPE
Caldwell v. Commonwealth
35 K.L.S. 10 at 4
(August 12, 1988)

KRS 520.030 provides that "a person is guilty of escape in the second degree when he escapes from a de-

tention facility or, being charged with or convicted of a felony, he escapes from custody." Caldwell was in the custody of the Perry County Jailer while awaiting transfer to LaGrange to serve a felony sentence. Caldwell was convicted of second degree escape after he was released by the jailer to obtain a haircut and did not return.

On appeal, Caldwell argued that the indictment charged escape from "custody" rather than from a detention facility, thus requiring the Commonwealth to prove that he was "charged with or convicted of a felony." Because no proof was introduced on this point Caldwell contended that his conviction was supported by insufficient evidence. The Court of Appeals held, however, that the indictment charged second degree escape "generally." The Court also found as a fact that the Commonwealth intended to prove escape from a detention facility rather than from custody. Thus, it was not required to show that Caldwell stood convicted of a felony.

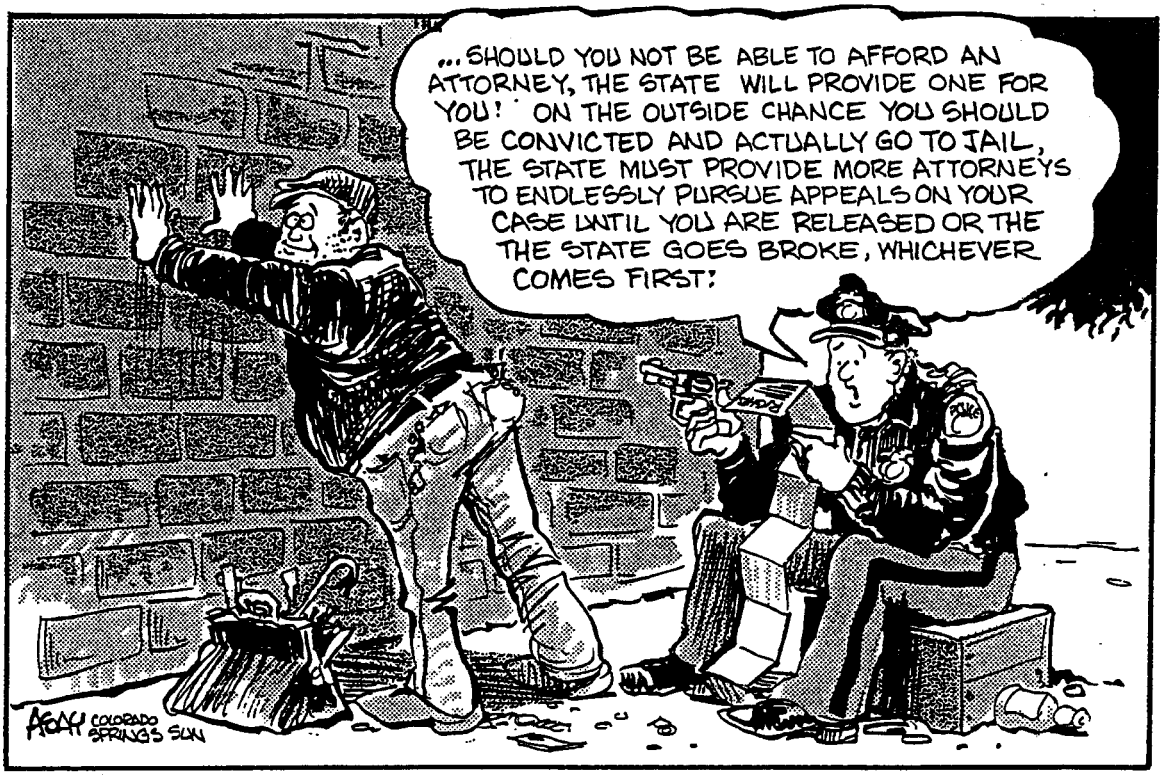
EXPERT TESTIMONY - "BATTERED WOMAN SYNDROME"
Craig v. Commonwealth
35 K.L.S. 10 at 9
(August 19, 1988)

Craig was convicted of first degree manslaughter based on her act of shooting her abusive husband. In support of a self-protection defense, Craig sought to introduce expert testimony that she suffered from "battered woman syndrome." The Court of Appeals held that she should have been permitted to introduce the testimony. The Court distinguished Commonwealth v. Rose, Ky., 725 S.W.2d 588 (1987), in which the Kentucky Supreme Court held that similar evidence was properly excluded. The Court of Appeals noted that the "expert" in Rose was unqualified, while Craig called as an expert a witness with "a specialized educational background, including a master's degree, as well as further advanced special training focusing on the problems of battered women." Judge Howard dissented.

MISDEMEANOR SENTENCING
Newton v. Commonwealth
35 K.L.S. 10 at 12
(August 19, 1988)

Newton was found guilty of both felonies and misdemeanors. The trial court then held a bifurcated sentencing hearing on both the felony and misdemeanor convictions at which Newton's prior record was introduced. The bifurcated sentencing hearing as to the misdemeanors was not held pursuant to any statutory authorization but pursuant to the court's "inherent authority to bifurcate the proceeding."

The Court of Appeals reversed after concluding that the trial court's action exceeded the scope of its discretion. The Court stated that evidence of a defendant's prior record is irrelevant to misdemeanor sentencing which should be "graded to the enormity of the offense" and not the character of the offender.



By permission of the Colorado Springs Sun

INSTRUCTION - INSUFFICIENT EVIDENCE
Hockaday v. Commonwealth
35 K.L.S. 11 at 2
(August 26, 1988)

In this case the Court, speaking through Judge Clayton, held that the trial court erred when it instructed the jury on misdemeanor theft by deception when the evidence showed that any stolen property was valued at more than $100. The jury was instructed on both the felony and misdemeanor degrees of the offense. The jury's conviction of Hockaday on the lesser included offense operated as an acquittal on the felony charge. Hockaday's conviction was reversed with instructions to dismiss.

Judge Dyche would have reversed on the different grounds that because the indictment did not allege a value over $100 it only charged a misdemeanor. Consequently, the circuit court was without jurisdiction to try the case.

Judge Howerton dissented on the grounds that the alleged errors were unpreserved.

KENTUCKY SUPREME COURT
UNITED STATES SUPREME COURT

No published opinions were issued during the covered periods of July 1, 1988 to August 31, 1988.

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The NLADA Death Penalty Litigation Section newsletter contains caselaw and other developments affecting death penalty litigation. For subscription information contact Mardi Crawford, Defender Division, 1625 K Street, N.W., 8th Fl., Washington, D.C. 2006 (202) 452-0620.

EXAMPLES OF APPOINTED COUNSEL FEES IN INDIGENT CAPITAL CASES

STATE	AVERAGE FEE	MAXIMUM FEE KNOWN
ALABAMA	$10-14,000	--
CALIFORNIA	$60,000	$150,000
CONNECTICUT	$39,850	$ 39,850
GEORGIA	--	$150,000
MARYLAND	$20,000	$ 44,000
NEBRASKA	$10-20,000	$ 20,000
NEW JERSEY	$43,000	$100,000
OHIO	$25,000	$ 25,000
WASHINGTON	$40,000	$ 60,000
* *		
KENTUCKY	$ 2,000	$ 2,500

PUBLIC DEFENDER POSITIONS AVAILABLE

THE ALABAMA CAPITAL REPRESENTATION RESOURCE CENTER JOB ANNOUNCEMENT

The Alabama Capital Representation Resource Center located at the University of Alabama has been set up to meet the legal needs of persons on death row. The Center seeks applications for 4 positions, each requires post-conviction capital litigation experience and Alabama Bar Membership (or next exam). EXECUTIVE DIRECTOR (to $43K) should be experienced resourceful manager with public relations and negotiation skills; SENIOR STAFF ATTORNEY (to $38K) should be a resourceful leader; TWO STAFF ATTORNEYS (to $30K). Detailed position descriptions available from/Resumes and writing samples to Frank S. James III, Box 1435, Tuscaloosa, Alabama 35487-1435. (205/348-5756).

NASHVILLE, TENNESSEE JOB ANNOUNCEMENT

Bill Redick has been named executive director of Nashville's Capital Resource Center. He is looking for 2 litigation staff attorneys with trial, appellate, and post-conviction experience. Salary is somewhat negotiable, but would at least be $42,000 yearly. If interested, call Bill Redick at 615-736-5047.

In the Trenches

District Court Practice

Gary Johnson

THE EYE IN THE SKY IS A LIE

The fall of the year brings a different perspective of harvest time to those of us who practice in District Courts in Kentucky ... for us, the annual ritual of defending marijuana cultivation cases begins. Instead of pumpkins and gathered corn, our minds are filled with television screen images of armed men in camouflage, swooping down from helicopters, raiding, hacking, and burning the controlled substance. It's just like in the movies. Our real life experience, of course, is not so dramatic. Did the client know the marijuana was there? Did they even know that it was marijuana? Was it "cultivated"? How did the police discover the substance?

These cases are increasingly more media event than law enforcement, especially in the use of aerial surveillance, and there's a reason for that. A state police spokesman has confirmed the rationale for the Green-Gray operations, euphemistically called "sweeps." It is not to charge citizens with crimes, but is largely to make folks who live out in the country falsely believe they are being watched.

Operation Green-Gray is a joint Kentucky State Police and National Guard effort to eradicate marijuana and prosecute growers. By calling the enforcement efforts "sweeps," officials create the impression that helicopters are systematically roving, county by county, over rural, less populated areas. The very idea of "sweep" conjures images of sophisticated sighting equipment operated by trained technicians on loan from the military, in an acre by acre search. Not true. There is no big eye in the sky that sees all.

In an article in the Licking Valley Courier in August, 1988, a State Police officer is quoted as saying that information about suspected marijuana plots is obtained the old fashioned way ... through the use of informants. The choppers don't go up until the field has already been located and identified by "reliable" informants. "[T]he 'choppers,' for economic reasons as much as anything, are usually sent to areas where there is good reason to suspect that marijuana is being cultivated and there is good expectation that the search will be successful."

The truth of this scenario was confirmed by State Police spokesman, Captain John Lyle, who cited the deterrent effect of the "sweeps." "An important element of crime prevention," he said, "is to increase the fear of detection and apprehension. A key component is the use of the media." He likened the program to the deterrent effect of unmarked police cars. It is not necessary to actually have the unmarked cars as long as the public thinks you have them. The program has resulted in smaller plots with fewer plants, as growers try to avoid aerial detection from sightings on random searches.

In short, all rural citizens are being made to think they are being randomly spied upon in order to deter the few individuals who are growing marijuana.

The Orwellian specter of the police joining forces with the Army to deal with any law enforcement issue raises legitimate concerns about the potential abuse of individual rights. As the lines between the military and the police blur, so blur the lines that define our zones of reasonable expectations of privacy.

There is a "chilling effect" on normal human conduct when the populace fears the omnipresence of the military. Is "domestic warfare" the inevitable price we pay to hinder Kentucky's biggest cash crop, estimated for 1987 by NORML (the National Organization for the Reform of Marijuana Laws) to be 1.5 billion dollars in illegal, untaxed income?

As with any law enforcement operation which relies upon unnamed informants, Operation Green-Gray is ripe with potential for abuse, even without military involvement. Informants may invite a fly over of innocent people's land for revenge or to harass a business competitor in this illegal industry. The program has already had its share of

bizarre results. Consider the case of the Elliott County man who was arrested in a "sweep." His alleged pot patch was located over a steep embankment near his rented trailer home. He was cited to District Court simply because he lived on the property. The case was only dismissed when the county attorney voluntarily informed the court that the man literally had no feet! He could not possible have traversed the steep incline to and from the patch.

As with all marijuana eradication programs, the role of the criminal defense counsel should begin early, usually in District Court. Issues of improper search and the implications of aerial surveillance upon Fourth Amendment protections should not be ignored. Vigorous use of subpoena power and cross examination at the preliminary hearing will provide important data for later motions to suppress.

Beware of the pitfalls of an early plea. Don't bet the farm on an attractive early offer, because you may literally be doing so. Federal confiscation laws are being more aggressively pursued than ever before. A plea resulting in no time in jail may still result in the more onerous prospect of loss of home and livelihood.

Remember, District Judges as well as Circuit Judges ought to be informed that Green-Gray is not a law enforcement operation, but is a media event. These "sweeps" are staged to create the misperception of widespread surveillance of the citizenry. The "war on drugs" may be a noble cause, but these false impressions make it a dirty little war, and we ought to give District Judges a chance to rule on that.

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NEW STAFF

Carolyn Clark and **Henley McIntosh**, both 1988 graduates of Salmon P. Chase School of Law, joined our Somerset Office on 9/16/88 as law clerks pending bar results.

David Williams, Assistant Public Advocate, a 1975 graduate of the University of Kentucky School of Law, joined our Pikeville office on 10/1/88.

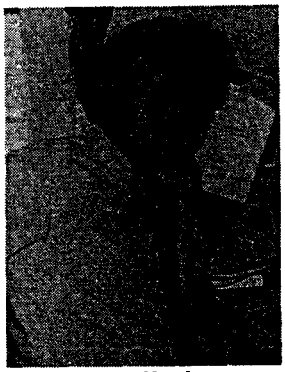
Larry Nickell, Assistant Public Advocate, a 1982 graduate of Memphis State School of Law, joined our Pikeville office on 10/1/88.

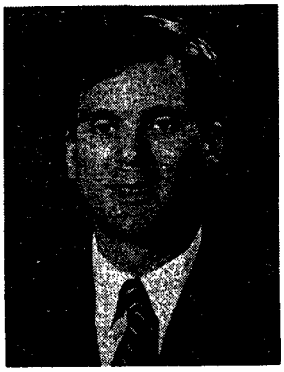
Bruce Franciscy, Assistant Public Advocate, a 1987 graduate of the University of Toledo School of Law, joined the Stanton office on 10/1/88.

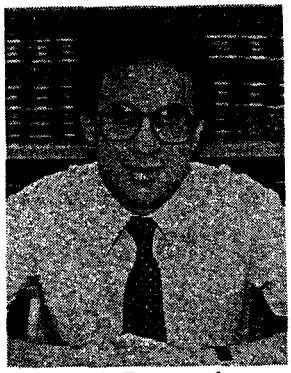
TRANSFERS

Danny Rose, Assistant Public Advocate, has transferred from the Morehead office to the Hazard office effective 10/16/88.

RESIGNATIONS


Mike Wright


McGehee Isaacs


Mark Posnansky

Bob Greene, formerly with our Hazard office, who has been with the Department since 3/16/87, resigned on 9/1/88. He is now a private attorney with Kelsey E. Friend Law Offices, P.O. Box 512, Pikeville, KY 41041, (606) 437-4026.

Mike Wright, formerly an Assistant Public Advocate with the DPA Frankfort Appellant Branch, resigned effective 10/1/88 to join the Attorney General's Consumer Protection Office.

Danny Martin, formerly the Pikeville office investigator, who has been with the Department since 4/16/87, resigned on 8/31/88 to attend law school.

McGehee Isaacs, formerly the Chief of the Post-Conviction Branch, who has been with the Department since 2/1/84, resigned on 10/1/88, to join Columbia Sussex Corporation.

Mark Posnansky, Assistant Public Advocate with the post-conviction and appellate branches, who has been with the Department since 1977 has tendered his resignation to become an associate with Morris, Garlove, Waterman & Johnson, 600 Marion E. Taylor Building, Louisville, KY 40202, (502) 589-3200.

6th Circuit Highlights

Donna Boyce

PRISON DISCIPLINARY COMMITTEE DECISIONS

In **Hensley v. Wilson**, ___ F.2d _, 17 S.C.R. 13, 15 (6th Cir. 7/12/88), the Sixth Circuit Court of Appeals address several issues arising out of a §1983 civil rights action brought by prisoners complaining about the manner in which prison disciplinary hearings are conducted. The prisoners' principal complaint was that their request to know the substance of the evidence considered by the disciplinary committee in support of the charges against prisoners, and the identity of confidential informants who supplied the evidence, was refused by the committee.

The Court dealt first with the issue of whether state corrections officials were entitled to qualified immunity. The Court concluded that the defendants in this case were entitled to qualified immunity because any violations they committed were not of "clearly established law." Thus, the defendants were immune from claims for damages.

However, the Court did find that injunctive relief was appropriate. It held that prison disciplinary committees are obligated to assess the reliability of inmate informants upon whose testimony they rely to deprive inmates of good time credits. A contemporaneous written record must be made of the evidence relied upon. The Court agreed with the defendants that they should not be required to make available to inmates information that seems, in the judgment of prison officials, likely to permit the identity of an inmate informant to be inferred. However, if, because of efforts to protect informant anonymity, the evidence in support of disciplinary action supplied to the inmate falls to meet the constitutional minimum of "some evidence," more detailed evidence, sufficient to meet constitutional standards, must be placed in a nonpublic record for purposes of review if and when the disciplined inmate files a federal court action.

PAROLE BOARD REVIEW

The Sixth Circuit reviewed a federal inmate's claim that the Parole Commission should have apprised him of letters it received concerning his possible parole and given him an opportunity to respond in **Liberatore v. Story**, ___ F.2d ___, 17 S.C.R. 16, 15 (6th Cir. 8/23/88). The Sixth Circuit found that a letter evaluated by the district court, which contained information already available to the inmate and the Parole Commission, did not entitle the petitioner to a hearing before the Commission regarding its contents. However, during the pendency of the appeal, additional letters to the Commission from federal agents and prosecutors surfaced that were not before the district court. The Sixth Circuit remanded the case to the district court for a determination of whether the Commission erred in failing to notify the inmate of the existence of these additional letters and by failing to afford him a hearing to respond to the letters.

INEFFECTIVE ASSISTANCE OF COUNSEL

In **Sparks v. Sowders**, ___ F.2d ___, 17 S.C.R. 16 (6th Cir. 8/23/88), the Sixth Circuit held that gross misadvice concerning parole eligibility can amount to ineffective assistance of counsel. Sparks faced murder - first degree robbery charges in Carter County in 1984. Three days into trial, he changed his plea and was sentenced to 35 years on the murder charge. The robbery charge was dismissed. Sparks alleged that his counsel advised him that he could receive a sentence of life without parole if convicted of murder. Since Ky. had no such penalty, he did not face such consequences, and would have been eligible for parole even if he received a life sentence. Sparks also alleged that had he been given the correct information concerning parole, he would not have pled guilty but would have continued with trial. The Court held that Sparks claims entitled him to an evidentiary hearing on his ineffective assistance of counsel claim.

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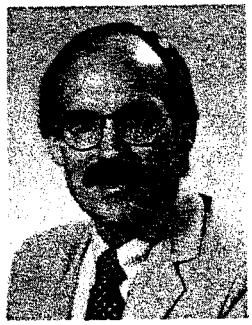
Plain View

Search and Seizure Law and Comment



Ernie Lewis

Question: Is it a good police policy to break into a building or home where the police have probable cause to believe that that facility contains contraband? Would any of us doubt the problems with such a policy? Would any of us fail to be outraged by police policy which so obviously ignores the core values of the Fourth Amendment? Can we imagine that our populace, the press, or other commentators would not effectively force back such a police policy?

Despite the answers to the above, the Supreme Court of the United States has cleared the way for just such police practices. In **Murray v. United States**, 487 U.S. ___, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988), the last search and seizure decision of the October 1987 term, the Court considered the question of whether "assuming evidence obtained pursuant to an independently obtained search warrant, the portion of such evidence that had been observed in plain view at the time of a prior illegal entry must be suppressed." In this case, police officers had probable cause to believe that marijuana was in a particular warehouse. Rather than obtain a warrant, or secure the particular warehouse, the agents forced their way into the warehouse at which time they saw many bales of marijuana in plain view. They thereupon left the warehouse and came back eight hours later with a warrant at which time they seized 270 bales of marijuana and notebooks listing the customers for the marijuana. The magistrate who signed the warrant to search the warehouse was not informed regarding the illegal entry of the warehouse.

In an opinion written by Justice Scalia, and joined by Justice Rehnquist, White and Blackmun, the search based upon the warrant was found to be legal. The Court relied upon the "independent source" doctrine of Silverthorne Lumber Company v. United States, 251 U.S. 385 (1920), Nix v. Williams, 467 U.S. 431 (1984) and Segura v. United States, 468 U.S. 796 (1984). The petitioner in the case had argued that evidence discovered during an illegal search, in this case the marijuana bales, should be suppressed. "A contrary rule will remove all deterrence to and indeed positively encourage, unlawful police searches." The Court rejected the petitioner's contention, however, because they saw "the incentives differently." Essentially, Justice Scalia says that an officer who has probable cause and searches illegally would be risking the admissibility of the evidence by placing an increased burden on the state to prove to the magistrate that there in fact was an independent source.

At the core of this decision is a feeling by the Court that the exclusionary rule should not be used to place the police in a worse position than they would have been, which has often been cited with the independent source exception. "[W]hile the government should not profit from this illegal activity, neither should it be placed in worse position than it otherwise would have occupied. So long as a later, lawful seizure is generally independent of an earlier, tainted one (which may well be difficult to establish where the seized goods are kept in the police's possession) there is no reason why the independent source doctrine should not apply."

The Court emphasized that the doctrine would not have applied if either the agents decided to seize what they saw, or the information seen was relayed to the magistrate who then relied upon it in issuing the warrant. Due to the fact that evidence had not been produced below regarding these questions, the Court remanded to the district court to see if agents would have sought the warrant without having entered the warehouse. I wonder what the agents will testify to?

There were three justices who dissented, Justice Marshall, Stevens and O'Connor. The dissent was short but harsh. Justice Marshall accused the majority of "emasculat[ing] the Warrant Clause and undermin[ing] the deterrence function of the exclusionary rule." The majority by their reliance upon the independent source exception had created "an affirmative incen-

tive for unconstitutional searches" according to the dissent.

The dissent focused on the fact that the agents in this case had not taken any steps to obtain a warrant at the time of the entry of the warehouse. Indeed, according to the testimony elicited at the suppression hearing, the agents had not even discussed obtaining a warrant. Under these facts, it was clear that this was a confirmatory entry where the agents were seeing whether the evidence that they believed was in the warehouse was in fact there so that they did not have to waste their time in obtaining a warrant.

The dissent saw this case for what it is, the establishment of a utilitarian and cynical method for the police to save time. After this case, the police, once they have probable cause, can simply break into the place and see whether in fact the evidence is there. If it is there, they need to be careful to not inform the magistrate of what they saw inside the building. If the evidence is not there, they can save time and not apply for a warrant. Admission of evidence in this case according to the dissent, "affirmatively encourages illegal searches. The incentives for such illegal conduct are clear. Obtaining a warrant is inconvenient and time consuming. Even when officers have probable cause to support a warrant application, therefore, they have an incentive first to determine whether it is worthwhile to obtain a warrant . . . the police thus know in advance that they have little to lose and much to gain by foregoing the bother of obtaining a warrant and undertaking an illegal search."

One of the interesting facets of this case is trying to square what occurred here with the Court's dependence upon warrants in United States v. Leon, 468 U.S. 897 (1984) and their emphasis upon the deterrent rationale to illegal police activity. Here, it appears that by failing to use the exclusionary rule the Court is in fact rewarding illegal police activity rather than attempting to deter it. Further, the Court has in effect connected illegality to the entire warrant process. One can expect good police practice now to include illegal entry following the procuring of probable cause and preceding the obtaining of a warrant. One must wonder how far this Court will go in twisting good prior 4th Amendment law to their purposes of facilitating law enforcement practices.

The Kentucky appellate courts during the last 2 months have issued 3 opinions in the search and seizure area, all of which unfortunately are not to be published. In the

Suit challenges strip searches at Graves County High School

Associated Press

MAYFIELD — An honors student at Graves County High School, with the help of the Kentucky chapter of the American Civil Liberties Union, is challenging the constitutionality of a school policy allowing strip searches of students.

The suit asks the court to declare the school's strip-search policy in violation of the U.S. Constitution's Fourth Amendment protection against unreasonable search and seizure, and its 14th Amendment guarantee of due process and equal protection under the law.

It also asks for an injunction to prevent further such searches, and seeks unspecified damages.

The suit, filed Friday in U.S. District Court in Paducah by Angy Williams through her father, William Hardy Williams, said Miss Williams was 15 at the time the strip search occurred Jan. 22.

The suit also said her locker and purse were searched by school officials looking for drugs.

The Williamses, of Symsonia, are represented by former state Attorney General Dave Armstrong and two associates at the Louisville law firm of Wyatt Tarrant & Combs, acting on behalf of the Kentucky ACLU chapter.

Dan Sharp, attorney for the Graves County Board of Education, defended the policy of allowing strip searches, saying state courts have upheld them in schools based on "reasonable suspicion" of illegal activity, the same test the board applies.

Sharp said that school officials were acting on information from another student that Miss Williams possessed a "white, powdery substance."

He said he understood that officials found a vial of a substance they do not believe is illegal.

Armstrong said it would require "extraordinary circumstances" to justify strip-searching a student.

"We're talking about a minor here. We're not talking about guns," he said.

The suit said Miss Williams was strip searched after searches of two school lockers she used and her purse uncovered nothing illegal.

Sharp and High school Principal Jerald M. Ellington said the board's policy requires the person conducting the search to be the same sex as the student, and a witness of the same sex must be present.

first one, **Jones v. Commonwealth**, issued 6/30/88, the Kentucky Supreme Court reviewed a situation where the defendant was charged with raping and kidnapping Tony, his girlfriend. The grand jury did not indict the defendant on those charges. However, the police heard that property taken from the home of one Grogan was at Tony's house. The police who received the informant's tip decided to go to Tony's house ostensibly to obtain an affidavit from her saying that she did not wish to pursue the rape and kidnapping charges. This was done despite the fact that the grand jury had already failed to indict Jones on those charges. Once they were there, Tony invited the police officers in. While inside the house, the police officers looked around and recognized items taken from the Grogan home. They used this information then to obtain a warrant at which time the items were seized. The Court approved of the entry into the home, saying that it was done with consent, viewing the question of whether it was a pretextual entry as "irrelevant."

On July 22nd, 1988, the Court of Appeals rendered the case of **Woodford v. Commonwealth**, not to be published. In this case, Mark Dowden broke into his girlfriend's house, later leaving on a motorcycle. The police were able to trace the motorcycle, which was damaged, to the defendant's farm. They traced Dowden there and found the damaged motorcycle at a tenant's house on Woodford's farm. They talked to Woodford and received consent for a search of his house. Nothing was found, including Dowden. However, they proceeded to search out buildings without Woodford's consent at which time contraband was found. The trial court justified the search as being conducted pursuant to hot pursuit and exigent circumstances, thereby not requiring a warrant. The Court of Appeals reversed, however, rejecting the exigent circumstances that were present and focusing instead on the sanctity of the home and the failure of the Commonwealth to meet its burden justifying a warrantless home search.

In **Gannon and Washburn v. Commonwealth**, another Court of Appeals case this time decided on August 12th, 1988, the Court reversed a guilty plea conviction which had been entered conditionally pursuant to RCr 8.09. Parenthetically, this case demonstrates the utility of the conditional plea, which was entered following an adverse ruling on a motion to suppress. In this case, an informant had gone to a local sheriff and told him that a drug deal was going to occur later that evening. The informant had pending charges and had never been used before by the sheriff. The informant told the sheriff that he had purchased drugs at the defendant's home. The sheriff checked and verified the defendant's address given by the informant and also verified that the defendant had prior drug offenses. He obtained a search warrant based upon this information. In executing the search warrant, drugs were seized. The Court reversed the trial court's refusal to suppress the drugs. The Court was concerned about the fact that there was no indicia of reliability of the informant nor had there been any indication of the basis of the knowledge obtained by the informant. The Court of Appeals in being concerned with indicia reliability and basis of knowledge returned to Aguilar/Spinelli, despite the cases of Illinois v. Gates, 462 U.S. 213 (1984), and Beemer v. Commonwealth, Ky., 665 S.W.2d 912 (1984). This demonstrates that while no longer a strict two-prong test, that Aguilar and Spinelli should continue to be important factors in the probable cause determination. Interestingly, the Court also rejected United States v. Leon, 468 U.S. 897 (1984) saying that the evidence here was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," an exception to the good faith exception contained in Leon.

The 6th Circuit upheld the privacy rights of public employees in two cases promulgated during the last few months. In two decisions penned by Kentucky native Boyce Martin, the Court held that mandatory drug testing of both firefighters and police officers was a violation of those employees' 4th Amendment rights. **Lovvorn v. City of Chattanooga**, 846 F.2d 1539 (6th Cir. 1988), and **Penny v. Kennedy**, 846 F.2d 1563 (6th Cir. 1988). The Court stated that "the act of urinating is one of the most private of all activities." Thus, society is prepared to recognize a reasonable expectation of privacy in this particular act. The Court rejected the argument of the government that "solely because a given employment industry is heavily regulated, such as air traffic control or horse racing, that it follows that mandatory urinalysis may be condoned in the absence of individualized suspicion." Lovvorn v. City of Chattanooga, supra. In the Penny case, the Court stated that there was a "continuum of employment categories that is defined by both the degree of suspicion that a drug problem exists and by the potential harm to society of an impaired employee operating in that employment sector." Both opinions can be used then to state that in this Circuit without individualized suspicion or without the existence of a drug problem in a particular employment category, mandatory drug testing of

all employees simply will not be allowed. It should be noted that in doing so, the 6th Circuit has gone contra to the 3rd Circuit which recently held that policemen may be the subject of mandatory drug testing. Policemen's Benelovent Association of New Jersey v. Washington Township, 43 Cr.L. 2245 (3rd Cir. 6/21/88).

The Short View

United States v. Dass, 849 F.2d 414 (9th Cir. 1988). Police officers in Hawaii were exposing packages to a police dog sniff in order to control mailing of marijuana, thereafter seizing the packages and obtaining a warrant to search. Here, the warrants were obtained 7 to 23 days following the seizure, which was too long according to the 9th Circuit. United States v. Van Leeuwen, 397 U.S. 249 (1970) set an outer limit of 29 hours for the issuance of a warrant following the seizure of a package;

Servis v. Commonwealth, Va. Ct. App., 43 Cr.L. 2271 (7/15/88). Just how far can Terry be extended by a creative appellate court desirous of affirming a conviction? The Virginia Court of Appeals shows us in this case. Here, the police received a call that a burglar might have broken into Room 315. Upon going to the room, the police found the defendant, who appeared "nervous" when he opened the door. He refused entry to the police. The police called a prosecutor regarding a warrant, who wisely said there was "no way" a warrant could be issued under those circumstances. The police went back to the room. After talking with the police, the defendant then went back into the room. Despite the fact that there was no evidence of the defendant being armed or dangerous, the police entered the room, finding baking soda and aluminum foil in the room, which lead to an arrest for possession of drug paraphenalia. The arrest then led to an inventory of the defendant's car which turned up marijuana and cocaine. In a terrible decision, the Court justified the entry of the room by the Terry justification of protecting the officer's safety. The subsequent arrest and inventory of the car were likewise justified by general exceptions to the warrant requirement. This all followed from a patently illegal entry into the defendant's motel room;

United States v. Sylvester, 848 F.2d 520 (5th Cir. 1988). A hunting box cannot be opened without a warrant. Such a box, often used to carry hunting paraphenalia, does not inherently reveal its contents in such a way that the carrier has no expectation of privacy in the box;

Anderson v. State, Fla. Ct. App., 43 Cr.L. 2327 (7/8/88). Officers stopped the defendant's Winnebago for traffic violations. While talking to the defendant, a "short straw" was seen, leading to an arrest for possession of paraphenalia. A search of the vehicle revealed cocaine and weapons. The Court reversed the conviction, holding that the existence of a short straw, which is similar to that used in fruit punch boxes, did not establish probable cause, and the arrest and search of the car were illegal.

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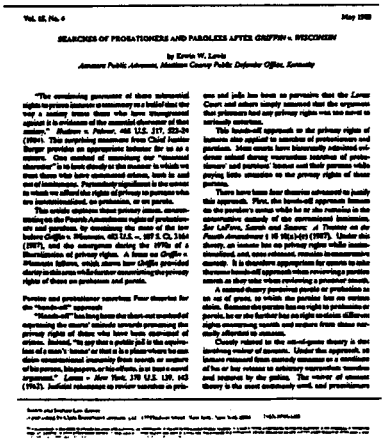
SEARCH AND SEIZURE LAW REPORT



Ernie Lewis had an article entitled, "Searches of Probationers and Parolees After Griffin v. Wisconsin," published in Search and Seizure Law Report (14 #4, May, 1988).

WOMEN LAWYERS ASSOCIATION
ANNUAL DINNER AND SPEAKER MEETING

The Women Lawyers Association of Jefferson Co. announces its Annual Dinner and Speaker meeting to be held on November 15, 1988 at the Seelbach Hotel. This year's speaker will be Marna Susan Tucker, the first woman president of the D.C. Bar Association. Her topic will be on "Gender Bias in the Judicial System." Her varied legal career includes activities in professional responsibilities, civil rights, legal ethics, and individual rights and responsibilities. Currently she is involved in the issue of gender bias in both the ABA and D.C. Bar.

The WLA invites all local, state, and federal judiciaries to attend as its guests. Interested people are invited to attend at a cost of $25.00 per person. (cocktails at 6:00 and dinner at 7:00 p.m.) Paid reservations are required. Mail your check to: Ms. Jeanne Clemmens, Ogden & Robertson, 1200 One Riverfront Plaza, Louisville, KY 40202. For further information, call Ms. Patricia Van Houten at 584-6936.

Trial Tips

For the Criminal Defense Attorney

HOW DRUGS AFFECT CRIME: A BRIEF PRIMER

Not all criminals take drugs, and not all drug abusers commit crimes, but street crime and dope go together like needles and syringes.

The belief that heroin addicts need more money than they can come by honestly to support their drug habits - and that this leads to crime - is a well-worn theme in television and other crime fiction.

But the relationships between various drugs and various crimes is subtle, complex and not as predictable as many of us believe, says a veteran professional observer of this nation's drug abuse explosion over the last two decades.

Dr. Eljorn Don Nelson is a professor of pharmacology at University of Cincinnati College of Medicine. He once worked at San Francisco's Haight-Ashbury Free Clinic, and he currently edits the Free Clinic's publication, "Journal of Psychoactive Drugs." Dr. Nelson has testified in drug-related trials - most recently the murder trial of Paul Kordenbrock and Michael Kruse in Boone County Circuit Court. A main point to keep in mind about drugs and crime, Nelson says, is that research has shown drugs do not cause crime. However, there are many ways in which drugs are associated with crime.

Here, based on Nelson's experience and research, is a primer on kinds of drugs and their relationship to the world of crime:

STIMULANTS

Among the drugs that are most heavily associated with crime are amphetamines - speed. This also is true of the cousins of these drugs - over-the-counter diet pills that contain a form of speed. Such pills are readily available in northern Kentucky.

Amphetamines bring a feeling of being superhuman, super-smart. In heavy doses, though, they bring paranoia and violence. The same is true of cocaine. "If you can afford enough cocaine, you get to the same place - paranoid psychosis," Nelson said.

It's the psychosis that leads to violence. Nelson cited the cases of "a 65-year-old woman who drew a gun out of a policeman's holster and shot a hole through the floor because she took PPA, a form of speed. "It's in all of these over-the-counter diet medicines. It's a good decongestant but has stimulant properties as a side effect."

Stimulants, along with narcotics, are the drugs people demand when they rob drug stores. Because of drug store robberies, including a recent Cincinnati robbery in which a pharmacist was murdered, some pharmacists have proposed that drugs be dispensed only in hospitals, where security is greater.

NARCOTICS

Narcotics are much discussed but little-understood. For example, most people believe a person becomes addicted to heroin as soon as he uses it for the first time. Not so. "Only 1 in 10 people who shoot heroin becomes addicted," Nelson said. "The mythology has been if we dry up the quantity of heroin, there will be fewer street crimes. But a University of Maryland study showed people will commit more crimes when the quantity of heroin goes down."

Common narcotics are heroin, morphine, methadone, demerol, codeine. With the exception of heroin, they are used legitimately as painkillers.

Short-term effects of narcotics put people "on the nod," give a euphoric feeling, can cause dizziness,

vomiting and constipation. Tolerance to narcotics can build rapidly, leaving the user addicted. Physical withdrawal symptoms include nausea, goose-flesh, muscle cramps and sweating. Addiction to narcotics can be so severe, and the alternative to continued use - withdrawal - so bleak a prospect, that stealing and killing are not infrequent means used to get the drugs, or money to buy them.

DELIRIANTS

Deliriants include belladonna, jimson weed and PCP, popularly known as angel dust. These drugs cause confusion, agitation and decreased attention span, and they dull the senses.

When somebody takes a such a drug - as is the case to some degree with all drugs - the effect is more than biological. It also is social and psychological. The social has to do with friends; the psychological with attitudes. In other words, the things a person has on his mind when taking a drug, and the things another person may suggest have great bearing on what the drug-taker's behavior will be under the influence of the drug.

HALLUCINOGENS

Lysergic acid (LSD), mescaline and "magic" mushrooms are all hallucinogenic drugs. They distort the senses, cause time-space disorientation, increased suggestibility and, of course, hallucinations.

To show how such drugs and behavior relate, Nelson speaks of the halves of the brain. Scientists have shown that the brain has two sides, and they are both there for a purpose, Nelson said. The left side handles linear, logical, verbal types of thinking. The right involves of non-linear, spiritual, mystical kinds of experience. "With hallucinogens, we were seeing the unleashing of the right side," Nelson said.

Nelson said he believes it is probably rare for people to commit violent crimes under the influence of hallucinogens, "because they are too spaced out."

SEDATIVE-HYPNOTICS

The nuts-and-bolts part of the brain, the part that was all man had when he was less involved, is still working, responsible for heartbeat, respiration, and so on. Much of the higher functions of the more sophisticated part of the brain have to do with inhibiting the actions of what Nelson calls the "old reptile brain" might order the body to carry out. "There are nerve cells that get up in the morning to keep the rest from doing things," Nelson said.

When drugs like the sedative-hypnotics are put in the body, they go to work right away on the brain functions that do this inhibiting work. For addicts, the drug is killing them. It's like they're riding on the wings of a supersonic transport with no helmet.

One of the most popular sedatives today is Quaalude, and it is available from two sources: pharmaceutical manufacturers and the street. The difference is important. A number of things happen when you take methaqualone and alcohol. There is, first, a solvent effect. The amount of the total depressant in the brain is rising faster, peaking faster and is more intense. It's partially correct to say the effect is like alcohol. But it does some other things alcohol does not do. For example, it gives a floating , tingling feeling - a feeling of detachment. This combination of drugs is associated with violence to self and others.

ALCOHOL

Society generally believes that all drug users are heroin addicts, Nelson said. "They commit crimes to get their heroin - everybody knows that," but about 10 percent of the population is addicted to alcohol, and it illustrates what Nelson calls "the naive idea that people take what they take because they want to." Not so, Nelson believes. "For the non-alcoholic, the question of if and when to drink is a reasoned matter. But if I'm an alcoholic, it's the most important thing in life."

There is an important association between alcohol and crime.

The number of people involved in crimes who have alcohol in their blood is statistically higher than the number of people in the general population who have alcohol in their blood, Nelson said.

MARIJUANA

There is little evidence to relate marijuana to crimes other than violation of laws against marijuana, Nelson said. "People who smoke pot probably are less likely to commit crimes than people who

don't smoke pot, because of lethargy," Nelson said.

But that doesn't mean the drug shouldn't be a cause for concern, Nelson said. "Ten percent of high school seniors are smoking pot every day. This is a grave mistake. When a student is drugged out, he can't learn to interact, is not growing as a person." Youth is the time humans learn to socialize, to get along with other people. Young people going through this formative period habitually stoned, Nelson said, are less like to learn the subtleties of how to live in society and far less likely to respect the laws that are supposed to bind that society.

DO DRUGS ALTER RESPONSIBILITY? TWO VIEWPOINTS

If a criminal is diagnosed as an alcoholic or drug addict, was he responsible at the time he committed his crime?

Should a criminal be treated differently if his crime was committed under the influence of drugs?

These and other questions of legal and humane aspects of the drugs-and-crime circle have come to be asked more frequently as both drug abuse and crime have continued to escalate. On one side of the argument, a drug abuser may be addicted, and therefore may have significantly less control over behavior. He may have developed psychosis - serious mental disorder. On the other side, if the criminal is not responsible, then who is? After all, somebody chose to break in the house, steal the TV, shoot the resident.

Both arguments were presented in this summer's Boone County Circuit Court murder trial of Paul Kordenbrock and Michael Kruse, as they have been in hundreds of trials here and elsewhere. Two experts testified at that trial, on opposing sides, about drugs and their effects on behavior, were Dr. Eljorn Don Nelson, a pharmacology professor, and Dr. Floyd Poore, a family physician.

Here is what they had to say during and after the trial.

CONSIDER THE REALITIES

Dr. Eljorn Don Nelson discusses the question of responsibility by focusing on the actions of drugs on the brain. He does not say that a drug abusing criminal isn't responsible for crime. Nelson maintains that a black-and-white view of the issue - from either side - ignores chemical, social and psychological realities of what happens when human beings take drugs. "The brain is like a computer functioning in a number of different modes, and when you take a drug, it puts you in a different mode," Nelson said. "The term 'levels of consciousness' refers to these modes."

A major legal problem with drugs and crime is one of "responsible drug use," he said. A contradiction exists here, though, because the concept of responsible drug use "falls apart when you start talking about drugs and crime." When you take a drug, although you may have left the launching pad with the best of intentions, in orbit your brain is functioning in a different mode. And Nelson said people who commit crimes often have been living in that different mode for years.

He illustrates with the action of PCP (phencyclidine) on behavior. Although PCP may have an unearned reputation as an agent of violence, it remains true that the drug is associated with bizarre re-ordering of consciousness, sometimes associated with violent crime. "PCP makes people go crazy, and is associated with murder and suicide, psychosis," Nelson said.

"People who take the drug voluntarily and believe they are back in Vietnam or on the Planet of the Apes, or that a bomb has been dropped and they're fighting the Russians, can kill family or neighbors."

Depending on what geographic state a person is in when he commits a crime after taking drugs, the law may or may not hold him responsible. "Many of the people who are committing crimes on drugs are living on drugs," Nelson said. "The average person sees a person who takes a drug over here, and commits a crime other there, and says: 'Well, the S.O.B. shouldn't have taken the drug over here'," Nelson said. "He has a vague idea of alcohol, but no in-depth appreciation for people who get up every morning and begin eating pills and smoking pot.

"The other approach is, in state of consciousness A, when they took the drug, and in state of consciousness B, when they committed the crime, there should be some difference in responsibility."

Medical students report alcohol, drug use: Almost nine out of 10 first-year medical students responding to a survey said they drunk alcoholic beverages, and slightly more than half said they had used or now were using illegal drugs.

But 96 percent said they did not smoke cigarettes.

The survey of seven U.S. medical schools, conducted by a team at the Medical College of Georgia in Augusta, is intended to find whether medical school stresses affect the use of substances.

A major problem in understanding the issue is the matter of addiction. Alcoholic behavior provides an example of how addiction comes into play.

Some alcoholics must drink a fifth of liquor a day just to maintain the level at which they function, go about their daily routines, Nelson said. If they drink less, they begin to feel symptoms of withdrawal: trembling, anxiety, heavy perspiring. If they drink more than a fifth, they may become drunk.

Three levels of intoxication are associated with drug dependency: maintenance, withdrawal, and intoxication greater than the maintenance level.

"The reality is, people commit crimes in all three of these states," Nelson said.

Nelson said he believes it is oversimplifying the issue of criminal responsibility to say one view on drugs is right and the other one is wrong. "It's a political issue," he said.

ONLY CHOICE THAT COUNTS IS FIRST ONE

Dr. Floyd Poore, a physician in family practice in Florence, testified for the prosecution in the Kordenbrock-Kruse trial.

Dr. Poore believes it does not matter what drug-induced state a person is in when he commits crime. The person should not be considered, in court, less responsible because he was under the influence of drugs.

Dr. Poore reasons this way: Ultimately, each person is responsible for his own actions. And while there is a point of drug abuse past which a person loses conscious control over his actions, that point is impossible to determine, because differences in physical make-up determine what effect a dose of a given drug will have.

Poore tells of men he has known - men who are not criminals - who can perform difficult tasks at such dangerous work as climbing high utility poles, while taking huge daily doses of barbiturates - sleeping pills. He cites this as proof that a person can behave responsibly, fully in control of himself, while even heavily under the influence of drugs.

Of criminals who take drugs, Poore said: "They know what they're doing, because they build such a tolerance." People who commit crimes while high are "psychopathic," Poore said. "A psychopath, according to Dr. Poore, displays with his behavior an attitude of: "I want what I want when I want it, and I don't care what I do or who I hurt to get it, and when I get caught I'll say I'm so sorry. I should have known better."

These criminals do not learn from their experiences, he said.

He agrees that there is a point past which a drug addict no longer has control over behavior. But, he asked, "Where is that point?"

Poore's view has a great deal of support in legal circles. Kenton County District Judge Chas Brannen, for instance, said, "The public is largely convinced that drugs commit crimes." But that's not so, Brannen said. In Kentucky law, drunkenness is not a defense to a crime. On the idea of drug abuse being a defense, Brannen said: "I just think that's basically an excuse."

WILLIAM WEATHERS
Kentucky Post Staff Writer
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The drug chart that appears on the next page is reprinted with permission of the Cincinnati Drug and Poison Information Center

Prisoners, drugs, and alcohol

Before committing the crime for which they were imprisoned—
- almost a third of State prisoners and a quarter of convicted jail inmates reported that they had drunk very heavily
- almost a third of State prisoners and a quarter of convicted jail inmates said they had been under the influence of an illegal drug
- three-fifths of the State prisoners who were under the influence of drugs also had been drinking

A quarter of the interviewed prison inmates said that they had drunk very heavily almost every day for the entire year before they were incarcerated.

More than half the State prisoners said they had taken illegal drugs during the month before committing the crime.

Compared to 40% of the general U.S. population, 78% of State prisoners and 75% of all jail inmates reported having used drugs at some time in their lives. Marijuana is the drug most commonly used by State prisoners and jail inmates.

Habitual offenders and persons convicted of assault, burglary, and rape were more likely than other State prisoners to be very heavy drinkers.

Alcohol use was most likely among jail inmates convicted of public order offenses and violent offenses, particularly manslaughter and assault.

Those offenders most likely to have been under the influence of drugs at the time of their offense were—
- drug offenders and burglars among State prisoners
- drug offenders and property offenders among jail inmates

Of prison inmates—
- whites, males, and persons between 18 and 25 years old are especially likely to be very heavy drinkers
- men are somewhat more likely than women to use drugs. A somewhat greater proportion of women than of men use heroin.

Prisoners and Alcohol
Prisoners and drugs
Jail Inmates, 1983

Bureau of Justice Statistics

Crime and Justice Facts, 1985

DRUGS OF ABUSE AND SOME OF THEIR EFFECTS

INFORMATION FROM THE CINCINNATI DRUG & POISON INFORMATION CENTER

TYPE OF DRUG	EXAMPLES AND COMMENTS	USUAL FORMS FOUND	POTENTIAL FOR EXCESSIVE USE TO LEAD TO PHYSICAL (Ph) AND PSYCHOLOGICAL (Ps) DEPENDENCE	COMMON EFFECTS AT PEAK OF DRUG RESPONSE	POSSIBLE IN OVERDOSES
Depressants	Alcohol, barbiturates, Placidyl, Doriden, Valium, Xanax and many others. Any drug used to calm or sedate could be in this category and may be called downers.	Alcoholic beverages and legitimate looking tablets and capsules.*	High for both Ph & Ps, varies somewhat among drugs. Ph withdrawal effects can be life threatening.	inebriation, impaired speech & judgement, confusion, sleepiness.	death from depression of breathing & from dangerous behavior under influence.
Stimulants	Amphetamines and most related diet drugs, amphetamine look alikes (contain caffeine and other legal stimulants), cocaine (crystalline) and processed (freebase, crack) and caffeine.	Legitimate looking tablets and capsules,* crystals, powders (usually white)	Ph low to moderate, Ps high; severe depression can occur on withdrawal and has led to suicide (except caffeine which can cause moderate depression and headaches upon withdrawal).	jitteriness, jolly or high feeling, talkativeness; may become irritable, fearful (paranoid), and aggressive.	hallucinations, increased blood pressure, death from heart rhythm defects and/or convulsions.
Narcotics Opioids	Heroin, morphine, Demerol, Dilaudid, codeine, Methadone, opium, Talwin, T's & B's (Talwin & an antihistamine), Stadol; most all drugs prescribed for severe pain.	Legitimate looking tablets and capsules; powders (white, brown or gray), and injectable liquids.	High for both Ph & Ps; varies somewhat between drugs. Ph withdrawal effects very uncomfortable but rarely life threatening.	initially may vomit, then become very calm ("on the nod") and euphoric.	death from depression of breathing and severe & unique toxic effects from contaminants (e.g. Parkinsonism from MPTP impurity).
Hallucinogens	LSD (acid, window-pane, blotter, micro-dot, blue stars), mescaline, psylocybin, MDMA, etc. These drugs can alter perceptions of reality.	Tablets, capsules, liquid or impregnated on blotters, stamps, pieces of clear gelatin, or other items.	No Ph; extent of Ps unknown, probably low.	incoordination, hallucinations, changes in space & time perception, may make irrational verbal statements & movements.	severe toxic effects unlikely; death can occur from dangerous behavior while under influence (e.g. driving).
Delirients	Phencyclidine (PCP, THC, angel dust) and any drug with actions like belladonna (such as Jimson Weed). Produce hallucinations & delirium at doses causing significant toxic effects.	Tablets, capsules, powder, seeds; may be in other drugs.	Low for Ph (gastro-intestinal & muscle symptoms are reported); moderate to high for Ps.	blank stare, confusion, disturbed speech, agitation, hostile behavior, gross incoordination, floating sensation.	death from heart & breathing system effects or dangerous behavior, convulsions, increased blood pressure.
Inhalants:					
A. Gasoline & Solvents	almost any vaporous liquid or aerosol may be inhaled for a temporary high.	certain glues, typing correction liquids, spot removers & other solvents.	Ph & Ps varies greatly with agent & patterns of use.	inebriation, impairment of judgement & coordination, delirium.	sudden sniffing death possible with overdose.
B. Nitrous Oxide	laughing gas, whippets intended for use in charging whipped cream canisters.	nitrous oxide is usually found in small metal containers.	Ph unlikely & Ps varies greatly with patterns of use, but has been reported.	laughing episodes & euphoria.	death from oxygen deprivation.
C. Amyl or Butyl Nitrite	Rush, poppers, amyl, etc.	The nitrites are very strong smelling solutions generally in small brown bottles.	Ps occurs; Ph questionable.	sudden lowering, then rising of blood pressure & heart rate, suffocating sensation, flushed prickly heat feeling.	less than ½ ounce has caused death when accidentally or intentionally swallowed. Death from cardiovascular collapse, blood disorders & convulsions.
Marihuana	Sinsemilla, grass, reefer, pot, Thai sticks; concentrated forms include hashish and hash oil.	generally as dark green or brown small plant particles; often in plastic bags or as cigarettes, black or brown cakes or concentrated oily liquid.	Ph low (reported symptoms vary); Ps low for most users, moderate to high for a few. Some cases of significant Ps occur.	mild stimulation & giddiness followed by relaxed euphoric feeling, red eyes, interference with thinking, judgment & recent memory.	severe immediate toxic effects unlikely; death can occur from dangerous behavior while under influence (e.g., driving).
Cigarettes & Tobacco Products	cigarettes, cigars, & other smoking preparations. Snuff, chewing tobacco.	brand name & generic cigarettes, dried & chopped leaves & "plugs."	Ph moderate, Ps high. Withdrawal syndrome: nervousness, confusion, agitation, drug seeking behavior.	dizziness, nausea, increased heart rate, peripheral vasoconstriction.	not typical with usual use. Accidental ingestion by young children can be medical emergency.

*Fake "look-alikes" exist for some drugs in this category. No one can be absolutely certain of the content or quality of any street drug without analysis.

SUPPORT FOR THE DEVELOPMENT OF THIS TABLE PROVIDED BY THE HAMILTON COUNTY COMMUNITY MENTAL HEALTH BOARD.

KRS CHAPTER 218A DRUG CHART

The drug chart that follows is an attempt to simplify the penalty provisions of KRS Chapter 218A, a most awkward drug statute.

This drug chart is not designed to replace the statute, but to act as a quick-reference research tool. In this regard, each statutory penalty provision has been inserted at the bottom of the section labelled "Conduct."

Only those provisions that dealt with sanctions have been included.

CONDUCT	SCHEDULE	IMPRISONMENT	FINE
Traffics or transfers	I or II [narcotic or included in KRS 218A.070 (1)(d)]	5-10 years 10-20 years*	$ 5,000-$10,00 $10,000-$20,00
KRS 218A.990(1)			
Traffics	I or II [non-narcotics; not included in KRS 218A.070 (1)(d); not marijuana; not LSD; not PCP]	1-5 years 5-10 years*	$ 3,000-$5,000 $ 5,000-$10,00
KRS 218A.990(2)(a)	III		
Manufactures, sells or possesses with intent to sell	I LSD, PCP	5-10 years 10-20 years*	$ 5,000-$10,00 $10,000-$20,00
KRS 218A.990(2)(b)			
Traffics	IV or V	Up to 12 mos. - jail 1-5 years*	Up to $500 $3,000-$5,000*
Transfers	I, II, III [non-narcotics; not included in KRS 218A.070 (1)(d); not marijuana]		
KRS 218A.990(3)			
Manufactures, sells or possesses with intent to sell			
a. less than 8 oz.	MARIJUANA	Up to 12 mos. - jail 1-5 years*	Up to $500 $3,000-$5,000*
b. 8 oz. or more but less than 5 lbs.	MARIJUANA	1-5 years	
c. 5 lbs. or more	MARIJUANA	5-10 years	$5,000-$10,000
d. hashish	HASHISH [Any amount]	1-5 years	
KRS 218A.990(4)(a)-(d)			
Sells or transfers [D18 or over - V under 18]	MARIJUANA [Any amount]	1-5 years 5-10 years*	
KRS 218A.990(5)			
Plants, cultivates, or harvests for purposes of sale	MARIJUANA	1-5 years	$3,000-$5,000
KRS 218A.990(6)(a)			

CONDUCT	SCHEDULE	IMPRISONMENT	FINE
Possession	I or II [narcotic or included in KRS 218A.070 (1)(d)]	1-5 years 5-10 years*	$3,000-$5,000 $5,000-$10,000
KRS 218A.990(7)			
Possession	I, II, or III [non-narcotics; not included in KRS 218A.070 (1)(d); not marijuana; not LSD; not PCP]	Up to 12 mos. - jail+ Same for subsequent offense	Up to $500 Same for subsequent offense
	IV or V		
KRS 218A.990(8)(g)			
Possession for own use; Transfers less than 8 oz.	MARIJUANA	Up to 90 days - jail+	Up to $250
KRS 218A.990(9)			
Possession for own use	I LSD, PCP	1-5 years 5-10 years*	$3,000-$5,000 $5,000-$10,000
KRS 218A.990(10)			
KRS 218A.140(3-5) violation [False prescriptions, etc.]	I, II, or III	1-5 years	$ 3,000-$5,000
KRS 218A.990(11)			
KRS 218A.140(3-5) violation [False prescriptions, etc.]	IV or V	1-3 years	$ 1,000-$3,000
KRS 218A.990(12)			
KRS 218A.140(6) violation [Advertising]; Catch All violation		Up to 90 days - jail	Up to $500
KRS 218A.990(13)			
KRS 218A.350 violation [Simulation]		Up to 12 mos. - jail 1-5 years*	
KRS 218A.990(14)			
KRS 218A.500(2-4) violation [Paraphernalia]		Up to 12 mos. - jail	
KRS 218A.990(15)			
Traffics: In any building used primarily for classroom instruction in a school, or On any premises located within 1,000 yards of any school building used primarily for classroom instruction	I, II, III, IV, or V	1-5 years If a more severe penalty is set forth in Chapter 218A, then higher penalty shall apply	$3,000-$5,000
KRS 218A.990(16)			

CONDUCT	SCHEDULE	IMPRISONMENT	FINE
Criminal Conspiracy to traffic in a controlled substance		Punished as if trafficked in that controlled substance	
KRS 218A.990(17)			
D between 14-17; and convicted of a violation of any offense under Chapter 218A; or adjudged delinquent for an act which would be offense under Chapter 218A			
Has motor vehicle or motorcycle operator's license		May recommend revocation of license for 1 year May recommend revocation of license for 2 years so long as suggested period of revocation does not extend past D's 18th birthday*	
KRS 218A.991(1)(a-b)			
Has no motor vehicle or motorcycle operator's license		May recommend no license be issued for 1 year May recommend no license be issued for 2 years so long as suggested period does not extend past D's 18th birthday*	
KRS 218A.991(1)(c)			

* Denotes Subsequent Offense
\+ Denotes Optional Commitment Treatment
D Denotes Defendant
V Denotes Victim

Search ruled illegal in airport drug case

By Sarah Sturmon
Post staff reporter

Just because a traveler fits a portion of the drug courier profile drawn up by the federal Drug Enforcement Administration doesn't mean agents have a right to stop and search that traveler.

A 6th U.S. Circuit Court of Appeals panel Thursday ruled that a drug enforcement agent did not have sufficient cause to stop a woman at the Greater Cincinnati International Airport January 10, 1986. A later search of the Los Angeles woman's luggage uncovered three pounds of cocaine stuffed inside sneakers.

The three-judge appeals panel Thursday unanimously upheld a lower court's ruling that Joslyn Stewart's constitutional rights had been violated when DEA agents stopped her at the airport after an agent observed what he termed suspicious behavior.

The three-judge panel ruled that the government did not have sufficient cause to stop Ms. Stewart and search her luggage for the cocaine.

The government had maintained that Ms. Stewart's actions fit the DEA's profile of a drug courier.

Her actions included: arriving on a flight from a city on a drug traffic route, in this case Atlanta; being one of the first people off the flight; looking for surveillance, and, picking up a piece of luggage that arrived on an earlier flight.

The judges agreed that Ms. Stewart fit the DEA's profile but held that these observations alone were not enough to stop her.

"The fact that Ms. Stewart picked up luggage from an earlier flight is behavior that innocent travelers engage in and, even when preceded by a frivolous search for luggage on the carousel, cannot be said to provide a reasonable basis for seizure," said Judge Nathaniel R. Jones.

Ms. Stewart was indicted by a federal grand jury in Covington on a charge of possession of cocaine with intent to distribute. Ms. Stewart's attorney had asked visiting U.S. District Court Judge Richard F. Suhrheinrich not to allow the cocaine seized during the search of her luggage to be used as evidence against her. Suhrheinrich granted the motion and the government appealed.

Capital Sentencing and Race in Kentucky

In 1986, we began a study of the capital sentencing process in Kentucky. This analysis was inspired by an earlier study of the Georgia death sentencing system by Baldus and his colleagues. The Baldus research introduced statistical proof demonstrating that the Georgia process was administered in a discriminatory fashion. This study revealed that black killers of white victims were significantly more likely to receive the death penalty, even when other significant, statutory, aggravating factors were taken into account. This evidence was introduced in a United States Supreme Court case, McCleskey v. Kemp, 481 U.S. __, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). Writing for the five justice majority, Justice Powell assumed the validity of the Baldus study but considered this evidence insufficient to demonstrate either unconstitutional discrimination or arbitrary and capricious sentencing.

Despite McCleskey (which was rendered after our research had begun), the impact of race upon the capital sentencing process is still a profound issue. If the Baldus study is replicated in other states, either further evidence of discrimination will be uncovered or a state system free of such problems will be revealed. Perhaps, a refinement in the eligibility cri- teria of capital sentencing can produce a more racially equitable result.

This summary focuses upon the first published work to emerge from our Kentucky analysis (Gennaro F. Vito and Thomas J. Keil, "Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision Making in the Post-Gregg Period," to be published in the Journal of Criminal Law and Criminology, Vol. 79, No. 2, (1988) pp. 301-321)). Here, we examine whether post-Furman capital sentencing in Kentucky is applied in an arbitrary or discriminatory manner.

Between December 22, 1976 (the effective date of Kentucky's death penalty statute), and October 1, 1986, there were 864 cases in which a person was indicted for murder and convicted and sentenced to prison under a death or lesser sentence. Of these, 557 had at least one statutory aggravating circumstance necessary to make the defendant eligible, and of these complete data was available on the 458 cases which were considered in the study. These cases resulted in 104 death qualified juries, and 35 death sentences.

Our initial determination was that extra-legal factors, particularly race, impinge upon capital sentencing in Kentucky. A higher proportion of black offenders who murdered whites go on to receive a death qualified jury (44.7%) than is the case among other racial combinations. None of the 14 white offenders with black victims made it to the level of a death qualified jury. Of the 140 black offenders eligible for a death qualified jury, 33.5% had white victims. Of the 33 blacks tried for a capital offense, 63.6% had white victims. Finally, of the 8 blacks who received a death sentence, approximately 87.5% had murdered whites. Blacks who killed blacks, like whites who killed blacks, had a very slight chance of being sentenced to death; only 12.9% of this subgroup faced a death qualified jury and only 8.3% received a death sentence.

We then employed a multivariate analysis technique to determine the extent to which the overrepresentation of blacks who kill whites in the capital sentencing system is a function of their involvement in objectively more serious crimes or the extent to which such a result is due to the extra-legal factor of race. Here, we considered two stages in the capital sentencing process: 1) the prosecutorial decision to seek the death penalty (DQJURY) and 2) the decision of the jury to sentence the defendant to death (LORD). The study considered the impact of approximately 85 variables concerning the offender, the victim, and the characteristics of the offense. The analysis then focused on those variables which were determined to be significant (through a technique called factor analysis) in this process: 1) CONCUR - whether the defendant had been charged with one or five felonies listed as aggravating circumstances in the Kentucky statute, 2)

MDEATH - did the crime involve multiple victims, 3) SILENCE - did the offender commit the homicide to keep the victim from testifying against him, 4) KMAGG - was more than one aggravating circumstance present, 5) FEMALE VICTIM, and 6) BKW - did the case feature a black killing a white.

The multivariate technique (logit regression analysis) considers the effect of these variables upon each level of the decision making process simultaneously. In other words, is the racial pattern evidenced in Kentucky due to the fact that blacks who kill whites do so in cases which can be considered as more heinous or serious? If so, then variables like MDEATH and KMAGG will "cancel out" the impact of race in the capital sentencing process.

However, our results showed that blacks who kill whites had a higher probability of being brought before a death qualified jury. Even though prosecutors are more likely to seek a death sentence when one or more identified predictors of the seriousness of an offense were present, the effect of a black defendant killing a white victim was independently statistically significant and positive. Controlling for differences in the objective heinousness of the offense, prosecutors are more likely to seek the death penalty when a black kills a white than in other homicide cases. The impact of race was not accounted for by the other variables in the model.

Yet, among those defendants who face a death qualified jury, when the seriousness of the homicide is considered, our published analysis revealed no evidence that blacks who have white victims, compared to other killers, were more likely to receive a death sentence. Rather than reacting to the combination of race of the victim and race of the defendant in imposing sentence, Kentucky juries may react to the objective heinousness of the murder. Thus race is a crucial factor in the first stage of the process of seeking the death penalty. Once a person faces a death qualified jury, factors other than race produce the final disposition.

There is a postscript to this study. We are still analyzing these data and when we submitted another article for publication a reviewer familiar with the statistical technique wrote that we had failed to adjust for the probability of receiving a death sentence within the parameters of the model. In other words, if your case had all or some of the variables considered (including race), what was the probability of facing a death qualified jury and receiving a death sentence? This reviewer was apparently convinced that, when such an adjustment was made, the impact of race would disappear. We made the adjustment and not only did the impact of race and all the other variables remain for DQJURY, race also emerged at the jury level (LORD). This refined analysis demonstrates that blacks who kill whites are more likely to receive a death penalty in Kentucky regardless of the seriousness of the homicide.

From a policy standpoint, what is the meaning of these findings? Are Kentucky prosecutors and juries inherently racist? Can some policy be developed which can halt discrimination in death sentencing? Unfortunately, this study cannot provide a definite, conclusive answer to these questions. The study is based upon a large number of cases and patterns present in the entire data set, taken as a whole. It cannot, for example, demonstrate racism in a single, particular case. The impact of race is a systemic one and for this reason, it confounds any (and perhaps all) attempts to restrain it. The study cannot identify the source of the discrimination but only if it exists in a certain level (prosecutors or juries). The findings cannot outline a policy to contain the discrimination present in the Kentucky capital sentencing process.

We did make one attempt, as suggested by the literature, to introduce a new policy through the introduction of KMAGG. As a result of the Baldus study, it was suggested that, if prosecutors were only permitted to seek the death penalty in cases with more than one aggravating circumstance, the effect of race would be eliminated. The Baldus study seems to indicate that such a policy would have restricted the impact of race in the Georgia capital sentencing system. However, KMAGG did not prevent BKW from emerging at both junctures of the Kentucky capital sentencing process. A requirement of two aggravating circumstances would not eliminate discrimination Kentucky capital sentencing. It seems that race is inextricably bound up with administration of the death penalty in Kentucky, even after the safeguards of Gregg were introduced.

We will continue our research in this area and hope to have the opportunity to share our findings with you in the future.

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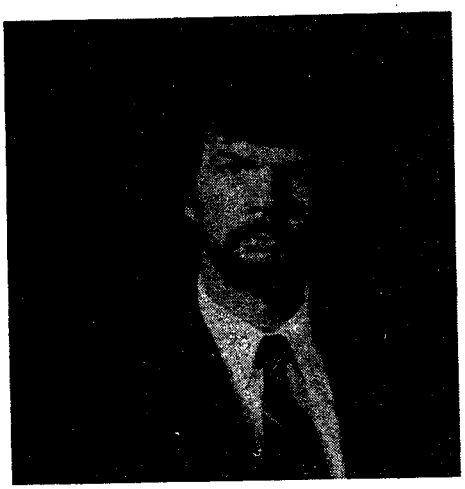
A NEW STUDY OF RACE AND KENTUCKY'S DEATH PENALTY: Our History

To understand the death penalty, we must also understand racism. Although we prefer to avert our eyes from the ugly history of racial discrimination and executions, we cheat ourselves and our community if we do. Racism is to capital punishment as deep roots are to the mighty oak. Despite the hopes of many well-meaning supporters of death as punishment, race continues to play a deciding role in who "gets it." So it has always been.

For the first 250 years of our national experience black persons, as the Chief Justice confessed in the Dred Scott case, were "regarded as being of an inferior order... altogether unfit to associate with the white race...so far inferior, that they had no rights...." This devastating reality was woven into the fabric, not only of our culture, but of our criminal law. Most Southern States, including Kentucky, promulgated "slave codes" which prescribed **different criminal penalties depending on the race of the defendant and the victim.**



KEVIN MCNALLY

The rape of a white woman, for example, was punishable by as little as two years if the rapist was white and mandatory execution if the accused was black. Even more important than the defendant's race was the race of the victim. Crimes committed against blacks were treated as minor matters. The death penalty was exclusively reserved for killing white folks.

The use of the death penalty as a political tool of social control is most readily seen by comparing use of capital punishment in court with racial violence outside. After the Emancipation Proclamation and the 13th Amendment purported to end courtroom subordination of blacks, matters were often dealt with on the street. Professor Leon Litwack listed "outrages" committed against black by whites in a few Kentucky counties in the first year after freedom: "23 inhuman beatings...4 shootings...2 robbing and shooting...3 robberies...5 men shot and killed...2 shot and wounded...4 beaten to death...1 beaten and roasted...3 women sexually assaulted...4 women beaten...2 women whipped...etc."

After the Civil War, Southern states transformed "slave codes" into "Black Codes", trying to keep the traditional difference in punishment. Lawlessness in and outside the courtroom led to the Civil Rights Act of 1866 and, ultimately, to the 14th Amendment. Although Kentucky's legislature was forced to repeal openly racist laws, such as the statute "excluding from jury service persons of the Negro race," blatant discrimination continued in Kentucky courts. This was accomplished in a number of ways. Principle among them was the acquiescence of the Kentucky Supreme Court in various actions of the Legislature, which passed a law, for example, prohibiting appeals from certain types of jury discrimination complaints. "We are without jurisdiction," the Court would lamely state.

Second, prosecutors, juries and trial judges were "bound to notice the intrinsic difference between... whites and blacks...." As they did, a new de facto discrimination in the application of state criminal statutes took hold. Prosecutors treated white victim cases differently than black victim crimes. Juries gave harsher punishments to crimes against their own race. Nowhere was the disparity more stark than in the punishment of sex crimes involving white women. For example, Wolfgang and Riedel examined over 3,000 rape convictions in 230 counties in 11 Southern states over a 20 year period. They discovered that blacks who raped whites were **18 times more likely** to be executed than any other racial combination.

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Corrections: Populations and Trends

Bill Clark

The responsibilities of the Corrections Cabinet are public safety, the humane and just treatment of convicted felons and their rehabilitation. To that end the Cabinet has a great interest in projections of population growth, the type of inmate entering our institutions and the cost of holding that inmate.

FIGURE 1

LONG-TERM PROJECTIONS OF INMATE POPULATION/CAPACITY

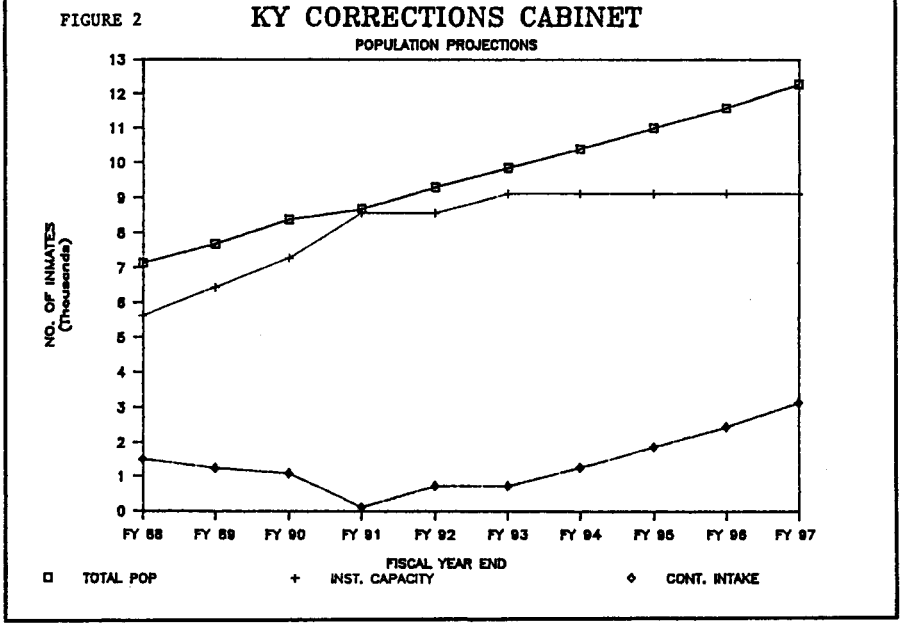
Year Ending	Total Felon Pop.	Total Institution Capacity	Total Community Bed Capacity	Total	Balance in Controlled Intake
FY 88	7,158	5,022	628	5,650	1,508
FY 89	7,707	5,414	1,048	6,462	1,245
FY 90	8,403	6,210	1,103	7,313	1,090
FY 91	8,713	7,500	1,103	8,603	110
FY 92	9,325	7,500	1,103	8,603	722
FY 93	9,877	8,050	1,103	9,153	724
FY 94	10,420	8,050	1,103	9,153	1,267
FY 95	11,038	8,050	1,103	9,153	1,885
FY 96	11,614	8,050	1,103	9,153	2,461
FY 97	12,306	8,050	1,103	9,153	3,153

*Controlled intake includes out-on-bond and out-of-state.

PROJECTED CORRECTIONS' POPULATIONS

Using computerized projection techniques, the total felon population at the end of FY 89 (July 1, 1988 - June 30, 1989) will be 7,707 and will grow to 12,306 by the end of fiscal year 1997. Using currently authorized beds, the Cabinet will have 1018 inmates backed up in jails by the end of this fiscal year and approximately 3,200 by the end of 1997 assuming no new capacity initiatives are developed (Figures 1 and 2). This includes expanding the new Morgan County facility to 1000 beds, the recent conversion of some minimum security beds to medium security, and the addition of more community service beds.

FIGURE 2



CURRENT CORRECTIONS POPULATION

In January of this year there were 5,518 inmates in state and private institutions, 1,267 in controlled intake, 850 in ISP (Intensive Supervision Program), 895 in ASP (Advanced Supervision Program) and 2,286 on active parole. With the exception of regular parole, each of these categories has been growing over the last four years (Figure 3). The number on regular parole has decreased due to the number of individuals placed in the ISP and ASP programs rather than on regular parole.

INCARCERATED INMATES BY CRIME

In January 1988 over one half of the inmates incarcerated had committed violent crimes (violent crimes include such crimes as robbery, murder, assault, etc.) and 31 percent had committed property crimes (Figure 4). Property crimes

include such crimes as theft, arson, burglary, bribery, etc. A total of only 262 inmates were incarcerated for property crimes only.

Of those inmates backed up in jails, 53 percent had committed property crimes and 23 percent violent crimes (Figure 5). The Corrections Cabinet attempts to take violent long term offenders from the jails first while short term inmates are often allowed to serve their entire sentence in local facilities.

COSTS FOR INCARCERATED INMATES

The cost for housing inmates at all levels of security in FY 1988 was $33.81 per day (Figure 6). The state currently pays Marion Adjustment Center $26.11 a day for keeping minimum security felons. The state's average cost in FY 88 was $24.80 for minimum security institutions.

COSTS FOR COMMUNITY CENTER INMATES

The average cost for inmates in community centers ranges from $16.00 to $24.59 per diem. Community Centers are a place for inmates to go when they are near to serving the end of their sentences or are close to being paroled. It gives them a chance to be slowly initiated back into society before they're released or paroled. The state currently pays $16.00 per day for state inmates backed up in county jails.

COSTS FOR PROBATION/PAROLE

In fiscal year 1986, the average cost to supervise a person on probation or parole was $2.39 per day.

RECIDIVISM

A three year study of those inmates released in 1982 shows an overall

FIGURE 3

KENTUCKY CORRECTIONS CABINET
POPULATION HISTORY

Date	Institutions	Comm/Res Centers	Jails	ISP	ASP	Regular Parole	Regular Probation
Jan 85	4583	237	703	71	---	3567	5160
Jan 86	4685	277	791	316	---	3471	5213
Jan 87	4756	520	1040	747	581	2848	5089
Jan 88	4929	589	1267	840	893	2324	5288

FIGURE 4

TYPE OF OFFENDER

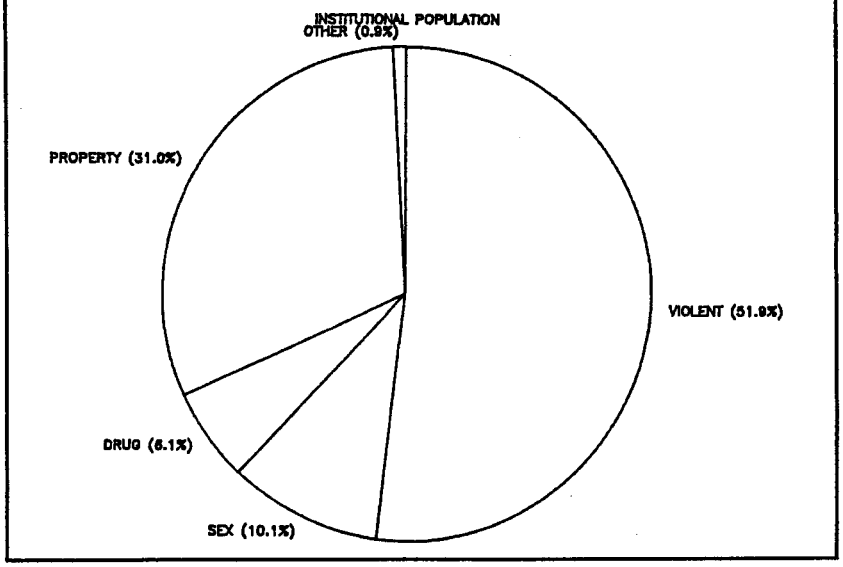
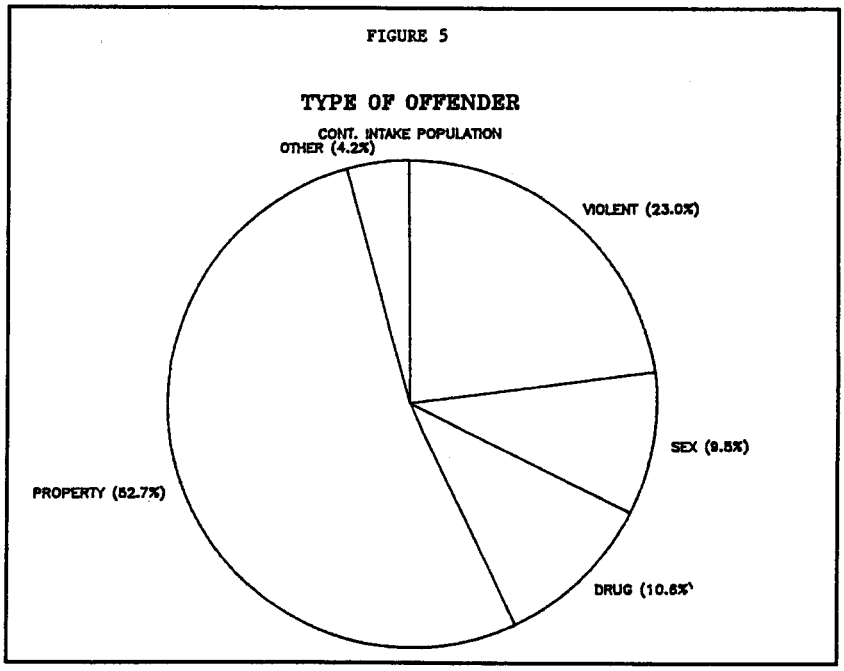


FIGURE 5

TYPE OF OFFENDER



recidivism rate of 36.16 percent with 18.5 percent of those being new crimes and 17.6 percent as technical violations. Technical violations occur when a person violates the stipulations placed on him/her by the parole board. That could be anything short of committing a new crime. The recidivism rate for violent offenders differs little from the population as a whole (Figure 7).

Of the 1,036 returned for violations in the three year period, almost 50 percent were for technical violations and 33 percent for property crime violations. Almost one third of those released in 1982 were violent offenders. Of the 144 who returned, 65 percent of them were for technical violations.

PFO INMATES

Since the current persistent felony offender (PFO) statutes were passed, the number of inmates serving as PFOs has grown dramatically (Figures 8 and 9). In September 1981 there were a total of 561 PFOs in Kentucky prisons. In September 1988 that number was 1,752, an increase of 212 percent. This amounts to approximately 29 percent of the population of our institutions. Approximately 44 percent of those PFOs are from Jefferson County and 14 percent from Fayette County.

A 1988 study by Statistical Analysis Center (SAC) at the University of Louisville revealed the average PFO is white, male, 25-34 years old, and serving as a PFO II. The rank ordering of the most serious charge for which the person received a PFO conviction was burglary, robbery, theft by unlawful taking, other property crimes, other violent crimes, sex offenses, other offenses.

FIGURE 6

COST TO INCARCERATE
PER DIEM

	1985	1986	1987	1988	1989*	1990*
Kentucky State Reformatory	32.01	33.14	33.34	36.05	38.17	39.73
Kentucky State Penitentiary	35.92	37.34	39.03	40.39	43.63	45.59
Luther Luckett Correctional Complex	30.59	33.03	34.40	36.14	34.48	35.05
Northpoint Training Center	29.35	30.16	31.99	31.34	22.31	28.43
Kentucky Correctional Institution for Women	37.29	40.24	39.55	42.09	46.33	41.54
Blackburn Correctional Complex	24.07	26.61	27.15	22.08	26.08	27.16
Bell County Forestry Camp	16.39	18.23	21.60	21.49	22.13	22.92
Frankfort Career Development Center	27.01	31.01	40.53	28.31	26.02	27.07
Western Kentucky Farm Center	19.16	21.47	20.96	21.99	21.50	22.29
Roederer Farm Center	15.93	18.67	18.83	25.64	21.21	21.93
Average	30.54	31.46	32.37	33.81	33.39	34.47

*PROJECTED

FIGURE 7

KENTUCKY CORRECTIONS CABINET
PERSONS RELEASED IN 1982
3 YEAR STUDY

Recidivism rate for all offenders for 3 year period = 36.16%.

18.5% = new crime
17.6% = technical violations

Recidivism rate for violent offenders for 3 year peiod = 36.73%.

16.69% = new crime
20.04 = technical violations

A. Most Serious Crime for all inmates released

Violent	31.17%
Sex	3.14%
Drug	8.34%
Property	54.90%
Other	2.44%

B. For Entire 1982 Group the Most Serious Violations resulting in their return

		Number of Individuals
Violent	10%	104
Sex	1.6%	17
Drug	3.6%	37
Property	32.9%	341
Other	3.1%	32
Technical	48.7%	505
	100%	1036

3 Year Study

C. Of the 893 violent offenders released in 1982 (31.17% of total) 144 were returned. The most serious type of violation at return over the three year period

		Number of Individuals
Violent	13.89%	20
Sex	1.39%	2
Drug	.69%	1
Property	15.97%	23
Other	2.78%	4
Technical	65.28%	94
	100%	144

LIFE WITHOUT PAROLE FOR 25

Another recent law which will have a great impact on our long term population is the sentence of life without parole for 25 years. Since this law was passed in 1986, there have been a total of 26 individuals sentenced under this law. The earliest any of these individuals is eligible to meet the Parole Board is the year 2008. If the Cabinet receives an average of eight of these inmates annually there will be a total of 176 of these individuals incarcerated before the first one is eligible for parole.

TRUTH-IN-SENTENCING LAW

House Bill 76, KRS 439.3401, passed by the 1986 legislature has also had a long term effect on the population of Kentucky correctional institutions. This law states that certain violent offenders must serve one-half of their sentence before being eligible for parole and those sentenced to life for a violent crime must serve 12 years instead of the normal 8 years. Since July 1986 there have been 85 inmates incarcerated under this law. The average time they must serve before they are eligible for parole has increased an average of 7.3 years per person.

GUILTY BUT MENTALLY ILL

The Corrections Cabinet, in cooperation with the Cabinet for Human Resources, operates the Kentucky Correctional Psychiatric Center (KCPC). Inmates needing psychological testing or suffering from mental illness often reside there during part of their incarceration.

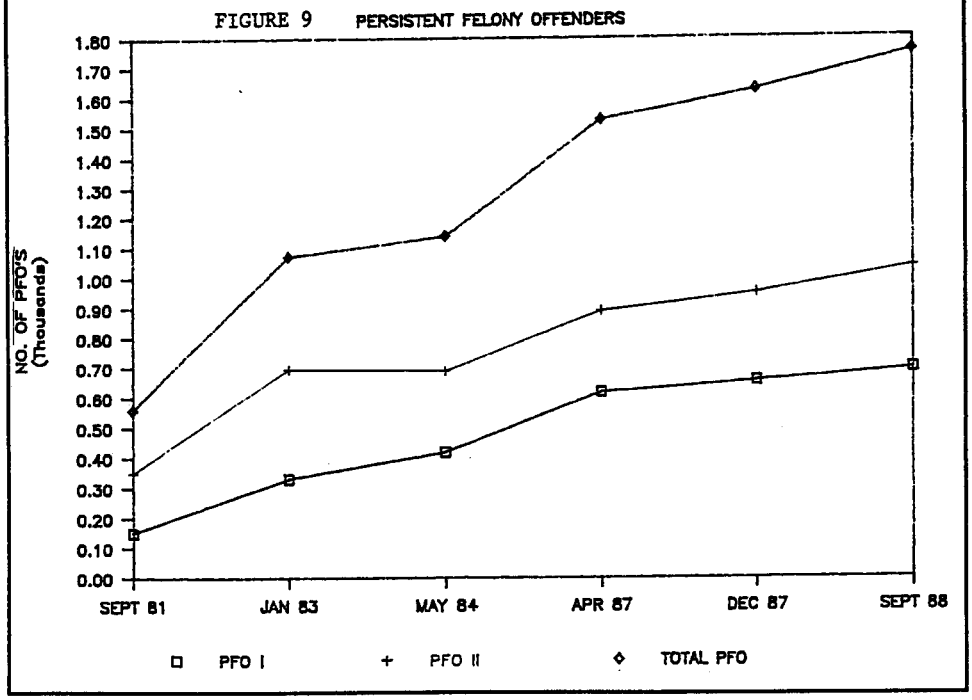
There are currently 56 inmates in our institutions who were found guilty but mentally ill. These inmates are in various institutions throughout the state. Of the 56, 8 are at KCPC receiving treatment.

FIGURE 8

KENTUCKY CORRECTIONS CABINET
PFO

	PFO I	PFO 2	PFO	HC	Total
September 1981	154	353	37	17	561
January 1983	333	698	26	18	1075
May 1984	421	692	21	8	1142
April 1987	620	893	11	6	1530
December 1987	656	953	13	5	1627
September 1988	697	1040	11	4	1752

FIGURE 9 PERSISTENT FELONY OFFENDERS



CONCLUSION

As one can see, different actions by different agents (courts, legislature, public demand) effect the population, both numerically and type, of those individuals entrusted to the care of the Corrections Cabinet.

The Cabinet will continue to fulfill its mission of public safety, just treatment of inmates, and the rehabilitation of those inmates within the fiscal and physical constraints afforded by legislative appropriations.

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William D. Clark has worked for state government for 14 years, 6 of them in Corrections, as a computer programmer/analyst. He is working towards a BS in Microcomputers at KSU. For the last 18 months, he has been Acting Branch Manager of Corrections' Planning and Evaluation Branch.

Our prisons play to full houses, but why?

By ROBERT F. DRINAN, SJ

THE INCREASE in the number of prisoners in the United States is staggering.

The attached chart from the American Correctional Association shows that the number of prisoners has escalated in 18 years from 213,000 to 582,000 — the highest level in the nation's history.

The following background information on prisoners is equally disconcerting:

1. White Americans were incarcerated in 1985 at a rate of about 130 per 100,000; the rate for blacks was close to 800 per 100,000.

A demand for vengeance has displaced almost any sense that prisons exist to retrain and rehabilitate.

2. Blacks comprise almost 12 percent of the general population but 45 percent of the federal and state prison population; this is nearly double the 23 percent of blacks in the total prison population when statistics were first kept, in 1925.

3. Blacks now make up 61 percent of incarcerated juveniles, 42 percent of the nation's prisoners on death row and 41 percent of those in local jails. In 1986, there were 234,000 black men and more than 12,000 black women in jails or prisons, or on probation or parole.

4. Every survey demonstrates that, when the people charged with crime are black, political pressures exist to inflate charges, set high bail and keep suspects in pretrial detention.

Jesuit Father Robert Drinan is a professor of law at Georgetown University.

The costs of incarceration are more than $10 billion annually. During the past eight years, $15 billion has been spent on new prisons across the country. The cost of maintaining a prisoner ranges from $15,890 in Delaware to almost $30,000 a year in California.

But even these outlays have not been adequate to prevent federal and state courts in 38 states from requiring improvements in prison conditions in order to comply with the Eighth Amendment's ban on "cruel and unusual punishment." One of the factors contributing to the overcrowding of prisons has been the increased length of prison sentences — often made mandatory by legislatures or imposed by judges who must run in periodic reelection campaigns.

In a recent book, *After Conviction*, Richard Goldfarb and Linda Singer reported that the consensus among prison officials is that only 10 to 15 percent of all inmates really need to be incarcerated to protect the public from physical injury.

There is further evidence that correctional institutions do not correct. The median period of incarceration is about 17 months, but 60 percent of all inmates return. But even if the rate of recidivism went down, one has to ask whether prisoners are being dehumanized in order to mollify public opinion.

The National Prison Project of the American Civil Liberties Union and other reform groups have proposed constructive alternatives. Sophisticated electronic devices are now available that enable law enforcement officials to know whether a probationer is in his home or whether he is acting in violation of the conditions of his parole. Halfway houses, treatment programs, intensive probation and community services are alternatives that are more promising that incarceration.

The incarceration rate continues to climb

Year	US population in millions	Numbers of prisoners	Prisoners per 100,000 population
1988	246	582,000	237
1987	244	546,000	224
1983	235	420,000	180
1980	227	321,000	142
1970	203	196,000	97
1960	179	213,000	119
1950	151	166,000	110
1940	132	174,000	132
1930	123	148,000	121
1925	106	93,000	88
1918	92	75,000	82
1900	76	57,000	75
1890	63	45,000	71
1870	40	33,000	83
1860	31	19,000	60
1850	23	7,000	30
1840	17	4,000	24

Source: American Correctional Association

The explosive growth in the number of inmates and the unprecedented expenditure of taxpayers' money for prisons have prompted the states to undertake several experiments. New efforts are being made to give some meaningful work and training experience to prisoners. By 1990, up to 30 states may be opening new and rigorous military-like training corps for first offenders. The privatization of prisons is also being investigated, although the initial interest in this proposal seems to be fading.

But the fact remains that a certain hysteria has taken over the administration of criminal justice in America. A demand for vengeance has displaced almost any sense that prisons exist to retrain and rehabi' tate. It is time to reflect and reexami crime and punishment in American life before the nation plunges deeper into a solution that does not solve the problem. ■

National Catholic Reporter
September 16, 1988

Prison crowding crisis feared

Legislative critic says warning just part of effort to gain funds

By Mark Chellgren
The Associated Press

FRANKFORT — Kentucky probably will run out of prison space in the next two weeks, which could mean a flurry of contempt of court decrees and more state prisoners in local jails, Corrections Secretary John Wigginton said Tuesday.

A leading legislative critic of the cabinet, though, said the warning is just part of the cabinet's efforts to gain increased funding.

Wigginton said the flow of prisoners into state cells has continued unabated since the last crisis the cabinet faced in October 1987, when a federal judge ordered the state to restrict the number of its prisoners housed in the Jefferson County jail.

The problem eased somewhat in December with the opening of beds at facilities in Frankfort and Bell County. Wigginton said those beds are now full and other space is shrinking.

Unless something changes, the cabinet is faced with the prospect of leaving state prisoners in local jails, Wigginton said.

"We recognize that would exacerbate the crisis in the counties and put us in conflict with a number of court orders," Wigginton said in an interview.

In addition to the Jefferson County order, the cabinet is under 11 other state court orders to limit the number of prisoners at various local jails.

Wigginton said the cabinet is seeking emergency funding from the General Assembly to expand the available space at the Northpoint Training Center in Boyle County because the greatest need is for space at medium-security institutions.

Sen. Ed O'Daniel, D-Springfield, said the cabinet is crying wolf about the space problem.

"They have to create a crisis in order to get the mystery prison approved but it won't work," O'Daniel said.

One of the proposals made by the cabinet to expand space is to buy an existing building and turn it into a medium-security institution. Cabinet officials have refused to identify the location of the proposed prison, leading legislators to dub it the "mystery prison."

O'Daniel said the Corrections Cabinet complains about a crowding crisis periodically to back up its pleas for more money.

"When it occurs year after year after year, a pattern develops," O'Daniel said.

Corrections officials, though, said population figures back up their warnings.

Of the 5,176 beds available in state-operated adult institutions, 5,123 of them were full on Tuesday, according to figures supplied by the cabinet.

The Cincinnati Post, Wednesday, March 2, 1988

Kathleen Kallaher

Truth-In-Sentencing

Mark Posnansky

"TRUTH IN SENTENCING - STRIPPING THE VENEER FROM RENEER"

This is the first of a two part article.

"Truth in sentencing" (TIS) is now the law in Kentucky. In 1986, the Kentucky legislature, reacting to an enormous public outcry following controversial verdicts in at least 2 celebrated murder cases, passed the so-called "truth in sentencing" statute. In actuality, "truth in sentencing" encompasses 2 statutes. KRS 532.055 sets out the procedure to be followed in regard to sentencing in all felony cases. KRS 439.3401 is concerned with parole eligibility for certain offenders whom the legislature has designated to be "violent offenders."

The basic thrust of KRS 532.055 is its establishment of a bifurcated procedure in all felony cases. This statute radically changes criminal procedure in Kentucky. Under the statute, the jury only determines whether the defendant is guilty or not guilty in the initial stage of the trial. The jury is not authorized at this stage to set any sentence even though a verdict of guilty may be found. During the second stage of the trial, the jury hears additional evidence in regard to the sentence to be set. Under KRS 532.055(2)(a), the prosecution is permitted to introduce the following evidence in regard to sentencing: minimum parole eligibility, prior convictions of the defendant, both felony and misdemeanor; the nature of prior offenses for which the defendant was convicted; the date of the commission, date of sentencing and date of release from confinement or supervision from all prior offenses; the maximum expiration of sentence as determined by the division of probation and parole for all such current and prior offenses; and the defendant's status if on probation, parole, conditional discharge, or any other form of legal release.

This provision, of course, is a radical departure from preexisting law in Kentucky. Prior to the enactment of this statute, the jury was not permitted to hear about a defendant's prior record in determining sentence unless the defendant was charged with being a persistent felony offender. Under no circumstances were prior misdemeanors ever relevant for sentencing purposes prior to this statute. Additionally, parole eligibility regulations and information is now admissible whereas it was strictly prohibited prior to the enactment of this statute.

The statute authorizes the defendant to introduce evidence in mitigation. The legislature has explained that mitigation "means evidence that the accused has no significant history of criminal activity which may qualify him for leniency." KRS 532.055(2)(b). There has been concern voiced by some criminal defense lawyers that by explaining what is meant by "mitigating evidence," the legislature is attempting to limit the defense during this stage of the trial. The concluding sentence of subsection (b) of the statute states that the defense is not precluded from introducing "evidence which negates any evidence introduced by the Commonwealth."

Two other important aspects of the statute are its requirement that the jury be instructed to recommend whether any multiple sentences are to be served concurrently or consecutively. Such a recommendation, of course, is only a recommendation and is not binding on the judge. Furthermore, the judge is authorized to set sentence if the jury reports that it is unable to agree on a sentence. The legislature has specifically deemed, in subsection (3) of the statute, that sentencing hearings pursuant to the new statute do not apply to sentencing hearings held in capital cases pursuant to KRS 532.025. Subsection (3) also states that sentencing hearings held under this new statute are to be "combined" with PFO hearings if the defendant has been charged with that offense.

CONSTITUTIONAL ATTACKS

This statute was attacked on broad constitutional grounds in Commonwealth v. Reneer, 734 S.W.2d 794 (Ky. 1987). It was argued that the

statute represented an unconstitutional and unreasonable intrusion by the legislature into the judicial branch of government. Section 109 of the Kentucky Constitution vests judicial power exclusively in the courts. The power to prescribe rules of procedure is granted to the courts in Section 116. Section 28 of the Constitution prohibits any department from exercising power properly belonging to another department. The Kentucky Supreme Court agreed in Reneer that KRS 532.055 violates the separation of powers doctrine, as enunciated in Section 28 of the Kentucky Constitution, but declined to invalidate the statute. Instead, the statute was upheld under the principle of comity. The court held that the specific provisions of KRS 532.055 do not pose "any unreasonable interference with the orderly functioning of the courts." Reneer, supra, at 797. The court stated that:

> One of the chief deficiencies in our present procedure is that, after reaching a verdict of guilt, the jury is required to sentence in a vacuum without any knowledge of the defendant's past criminal record or other matters that might be pertinent to consider in the assessment of an appropriate penalty. On balance, the inconvenience of a bifurcated trial is a small price to pay for a better informed sentencing process. Id., at 797.

While refusing to invalidate the whole of KRS 532.055, the court "reserve[d] the right to consider any abuses or injustices alleged to be caused by KRS 532.055 when presented by a proper case...." Id., at 798.

Justice Leibson, joined by Justice Lambert, wrote a vociferous and lengthy dissent. Justice Leibson went into much greater detail in his dissent than did the majority. The majority decision was very broad and did not address many of the specific problems inherent in the statute. Justice Leibson did so and strenuously pointed out many of the vexing problems which could be expected to arise in the day-to-day operation of the statute.

A number of issues exist in regard to KRS 532.055 which were not answered by Reneer. Some of these issues have been raised and are pending in other cases. There are cases presently before the appellate courts which challenge the right of the prosecution to present evidence in regard to parole regulations. As is cogently pointed out by Justice Leibson in the dissent in Reneer, the Parole Board actually has the power the grant parole any time it wishes. The regulations, in truth, do not regulate anything at all. "Thus, at least from a theoretical viewpoint, we [have] in Kentucky an indeterminate sentence with a maximum term that [is] fixed by the jury and no minimum term." Reneer, supra, at 800 (Leibson, J., dissenting).

Any mention of parole has always been strictly prohibited under Kentucky law. Farmer v. Commonwealth, Ky., 450 S.W.2d 494 (1970); Postell v. Commonwealth, 174 Ky. 272, 192 S.W. 39 (1917). This particular portion of KRS 532.055 was not specifically addressed in the majority opinion in Reneer. Even if the Commonwealth can show that all prior offenses, even misdemeanor offenses, ought to be admitted at sentencing, the same argument may not hold in the case of parole regulations. At least evidence of prior convictions, even misdemeanors, relate directly to the defendant being sentenced. It is easier to understand the relevancy of prior convictions than it is to understand or appreciate the utility of allowing parole evidence into the sentencing phase. Evidence regarding parole is highly circumstantial, highly speculative and contingent upon many variables. Indeed, as Justice Leibson pointed out, it is misleading to even refer to the guidelines as "regulations" since the Board can actually grant parole anytime it wishes.

A plethora of problems exist in regard to subsection (3) of KRS 532.055 which allows PFO proceedings to be "combined" with sentencing hearings under the statute. There is no guidance in regard to how this procedure is to be implemented. There is presently a case before the Kentucky Supreme Court wherein the Fayette Circuit Court did not instruct the jury to actually set sentence on the underlying felonies before enhancing that sentence. The court merely instructed the jury on the enhanced range if the defendant was found guilty of being a persistent felony offender. Because the persistent felony offender statute defines only a status, not an independent criminal offense, this procedure would seem to be in error. Mallicoat v. Commonwealth, Ky., 637 S.W.2d 640 (1982). It furthermore

conflicts with the majority opinion in Reneer which envisions that the jury first fix a penalty on the basic charge in the indictment before enhancing that penalty as a persistent felony offender. Id., at 798.

Reneer only dealt with KRS 532.055. The other portion of the truth in sentencing law is KRS 439.3401 which mandates that specific "violent offenders" are subject to new parole guidelines.

The statute begins by defining what is meant by a "violent offender."

> "Violent offender" means any person who has been convicted of or pled guilty to the commission of a capital offense, class A felony, or class B felony involving the death of the victim, or rape in the first degree or sodomy in the first degree of the victim, or serious physical injury to a victim. KRS 439.3401(1).

The Corrections Cabinet has listed the following offenses as coming under the statute: murder, manslaughter in the first degree, rape in the first degree, sodomy in the first degree, assault in the first degree, kidnapping (where there is serious physical injury or death), arson in the first degree (where there is serious physical injury or death), criminal attempt, criminal solicitation, or criminal conspiracy to commit any of the previously listed capital offenses or class A felonies which involve serious physical injury or death of the victim.

The Corrections Cabinet is interpreting the statute to mean that any person designated as a violent offender who is sentenced to a specific term of years must serve 50 percent of that term before being eligible for parole. Any person designated as a violent offender who receives a sentence of life is eligible for parole after 12 years.

The constitutionality of KRS 439.3401 is presently before the Kentucky Supreme Court in at least two cases. The biggest problem with the statute is the fact that persons who receive a life sentence are, in many cases, eligible for parole sooner than persons who receive a term of years. This is contrary to both common sense and any orderly system of sentencing. Common sense would dictate that a life sentence is a more severe sentence than a term of years, but common sense seems to have been abandoned by the legislature when the statute was passed. Under the present scheme, a person convicted of murder who receives a sentence of life is eligible for parole sooner than a person who receives a term of years in excess of 24 years. Since even a sentence of 25 years would carry a parole eligibility of twelve and one half years, it can be immediately seen that such a person would have to serve longer than a person who receives a life sentence. The constitutionality of this scheme is presently before the Kentucky Supreme Court on the grounds that it is so irrational and arbitrary as to violate the due process clause of the federal constitution and Section 2 of the Kentucky Constitution. Meyer v. State of Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); Roe v. Commonwealth, Ky., 405 S.W.2d 25 (1966).

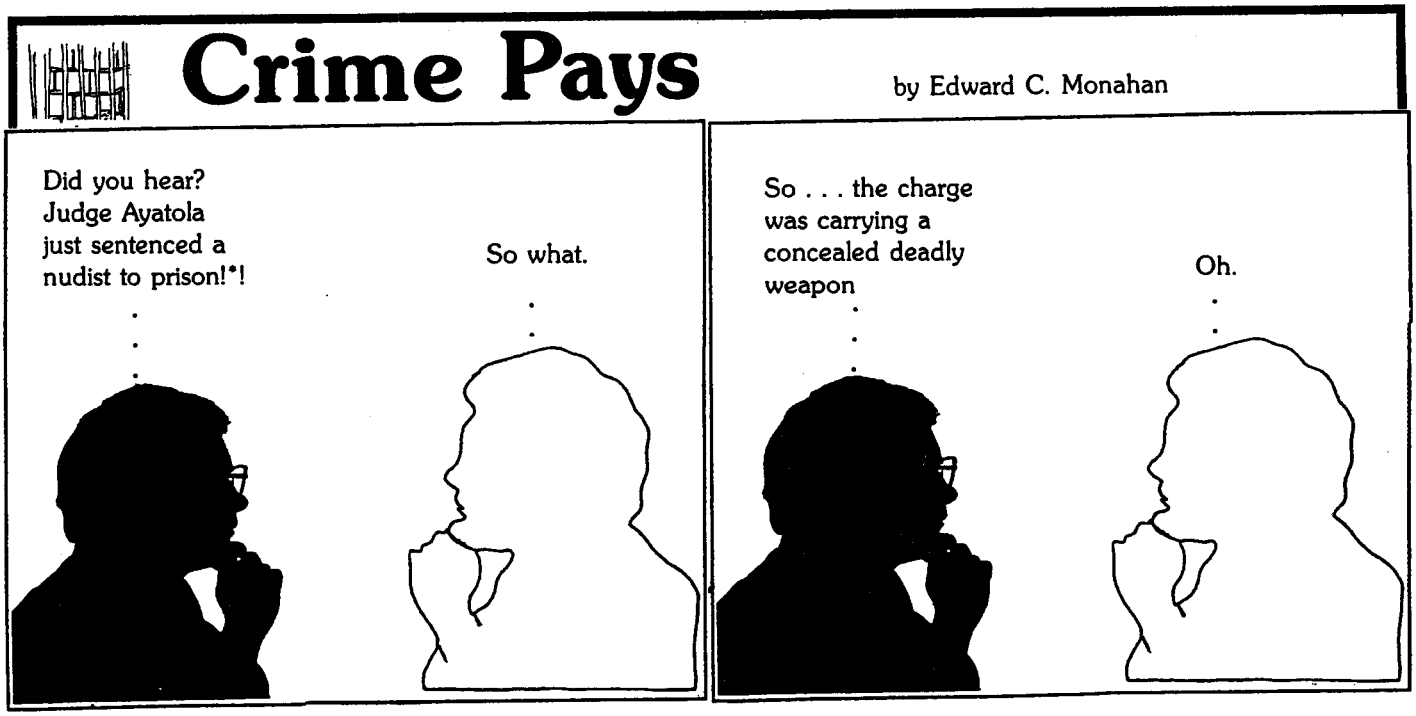
There are many problems inherent in KRS 439.3401. One of the most vexing problems faced by counsel is how to argue the case to the jury. This statute is a veritable Rubic's cube. The more one attempts to work with this statute and resolve its many riddles, the more impossible it seems to become. How is counsel to proceed? If your client has been convicted of murder, counsel may well be tempted to ask for a life sentence in order that parole eligibility will attach after 12 years. In some ways this is preferable to asking for a term of years since anything over 12 years would carry a greater parole eligibility than a life sentence. This most definitely presents a quandary. In order to make it possible for a client to serve out the sentence, a term of years is necessary. But a term of years, in many cases, carries a greater parole eligibility than a life sentence. If the attorney wants to facilitate a shorter parole eligibility, it may be necessary to forego the possible serve out. This is irrational and makes no sense. Conversely, the prosecutor is presented with the same quandary. In order to guarantee that a particularly dangerous felon cannot serve out the sentence, a life sentence would ordinarily be sought. But the parole eligibility for such a sentence is shorter. The statute makes no sense where either side is concerned.

The statute violates the 6th Amendment of the federal constitution and Section 11 of the Kentucky Constitution in that it interferes unreasonably with the right of a criminal defendant to the effective assistance of counsel. Because the statute makes it impossible for a defense attorney to ever intelligently advise a client of what would be in his or her best interest, the statute is unconstitutional and deprives the defendant of the effective assistance of counsel. Brooks v. Tennessee, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972). It deprives a criminal defendant of the opportunity and the right of

having his attorney utilize those professional skills which are guaranteed under the 6th and 14th Amendments. In any courtroom confrontation, there are, of course, certain risks and certain unpredictabilities. Quite commonly, an attorney must make estimates and deal with probabilities and uncertainties. The attorney must sometimes decide whether to put a particular witness on the stand and ask whether the demeanor of that witness will help or hurt the client. In other cases, the attorney might have to decide whether to ask for a lesser included instruction or try to obtain a total acquittal. There is some degree of uncertainty in every case, but in the great majority of cases there is a logical and reasonable progression of events. The competing factors are at least rational and the desired results can be ascertained with some degree of clarity. Not so with KRS 439.3401. It is completely illogical and irrational and bears no reasonable relation to justifiable or common sense sentencing scheme.

Another complaint which can be made in regard to KRS 439.3401 is that it is unconstitutionally vague. The statute quite simply fails to give fair notice to those persons subject to it and fails to adequately guard against arbitrary and discriminatory enforcement. Kolender v. Lawson, 461 U.S. 351, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). One example of the statute's lack of clarity can be seen when capital offenders are considered. In Kentucky murder is a capital offense. KRS 507.020. It is not designated in the penal code as a class A felony. Subsection (2) of KRS 439.3401 provides for a 12 year parole eligibility for class A felons who receive a life sentence. This section also specifically refers to violent offenders who have been convicted of capital offenses and not been sentenced to 25 years without parole. But the statute is unclear as to the parole disposition of such offenders. It could certainly be argued that, since subsection (2) places no qualifier on its provision regarding capital offenders, the legislature intended for all capital offenders who do not receive life without parole for 25 years to be eligible for parole after 12 years. That interpretation is possible, but the Corrections Cabinet is not interpreting the statute in that way. Under Correction's interpretation, a capital offender receiving a life sentence is eligible for parole in 12 years while capital offender receiving a term of years must serve fifty percent before being eligible.

Corrections' interpretation, however, is not supported by the language of section (3) of KRS 439.3401. That section clearly provides that class A and class B violent offenders receiving a term of years must serve 50 percent before parole eligibility. But there is absolutely no mention in that section of capital offenders The statute is far from clear, but, as was stated previously, an argument could certainly be made that all capital offenders are subject to the 12 year parole eligibility requirement.



An argument could also be made that this statute violates equal protection and the prohibition against cruel and unusual punishment. The equal protection clause is satisfied if the classification is drawn by a statute rationally related to a proper governmental purpose and all the persons within the class established are treated equally. Clements v. Fashing, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982). The arbitrary and irrational distinctions of KRS 439.3401 also implicate the cruel and unusual clause of the 8th Amendment and Section 17 of the Kentucky Constitution. See Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.-2d 630 (1958).

PROCEDURAL ISSUES

KRS 532.055(3) mandates that all TIS hearings be combined with PFO hearings under KRS 532.080. In Reneer at 798, the Supreme Court stated it perceived no apparent difficulty with this procedure and the penalty and PFO phases could be combined because "the same evidence that is pertinent toward fixing the penalty is also pertinent for consideration in the enhancement of sentence, and the jury in the combined bifurcated hearing could be instructed to (1) fix a penalty on the basic charge in the indictment; (2) determine then whether the defendant is guilty as a persistent felony offender, and if so; (3) fix the enhanced penalty as a persistent felony offender. In Lemon v. Commonwealth, Ky. App., _____ S.W.2d ____ (decided 7/22/88), motion for disc. review filed 8/12/88, Judge West held that although combining TIS and PFO hearings creates apparent difficulties and much confusion, it does not violate due process and is dispositive. Judge Combs dissented. However, a number of issues arise in a combined hearing concerning what evidence may be introduced and what the jury will be told concerning how to apply that evidence to their sentencing decisions.

First, the instructions in a combined TIS/PFO procedure should require the jury to set a sentence for the underlying offense before determining guilt or innocence and sentence the PFO charge. KRS 432.080(1) states that a jury may enhance the punishment of a persistent felony offender in lieu of the sentence of imprisonment already assessed for his present crime.

If no instruction requiring that sentence be set on the underlying offense is given, the jury may never be told the range of penalties for that offense. This violates due process and § 2 of the Kentucky Constitution. The harm is that the jury may feel that the basic sentence range provides enough punishment for the defendant and the jury may then nullify the PFO charge or give only a slight enhancement. Additionally, the jury should be forced to complete each step of the sentencing in its proper order so they consider evidence appropriate to each determination separately without being faced with a mishmash of evidence, no guidance and only one basic PFO decision. The purpose of the TIS statute is to affect sentencing on the underlying offense.

Numerous issues amounting to due process and § 2 violations arise from the clash between numerous decisions controlling the PFO procedure and many TIS procedures concerning what evidence may be introduced in the penalty phase. For example, in a PFO hearing, it is improper to introduce indictments or other evidence of the nature of the offense. See Hibbard v. Commonwealth, Ky., 661 S.W.2d 473 (1983); Berning v. Commonwealth, Ky., 565 S.W.2d 443 (1978); Berning v. Commonwealth, Ky., 550 S.W.2d 561 (1971); Johnson v. Commonwealth, Ky., 516 S.W.2d 648 (1974). However, KRS 532.055(2)(a)(2) allows for evidence of the nature of prior offenses. So the particulars of the prior offenses including victim's names, undercover officers' names, specific places will be placed before the jury for TIS purposes at the same time they are hearing evidence on the PFO charges. This is unacceptably prejudicial.

An argument can be made that when TIS provisions conflict with statutory or judicial PFO precedents, the TIS provision should be suspended or at least restricted. So a prosecutor should not be allowed to show the nature of the offenses on a prior conviction being used to PFO the defendant. The cases decided by Kentucky appellate courts concerning PFO hearings are based on sound reasoning which should not automatically be scrapped by the advent of KRS 532.055. In the unpublished case of Waller v. Commonwealth, 87-SC-464-MR, the Court was asked to vacate a sentencing hearing in which copies of indictments from the defendant's prior offenses on which he was charged as a PFO were introduced under TIS to show the nature of prior offenses. While holding that there was no harm since the defendant received the minimum sentences, the Supreme Court noted that indictments are not evidence and that it would have been better practice to redact the names of victims and police officers from the indictment to remove the possibility that jurors were familiar with persons involved in the prior charges.

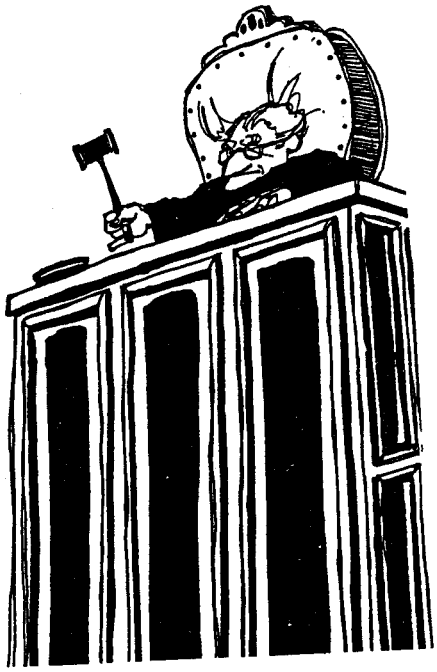
Another example of evidence held too prejudicial to be introduced during a PFO hearing is evidence of

the defendant's parole history other than a release from parole within 5 years to qualify that prior felony under the statute. See Burton v. Commonwealth, Ky. App., 715 S.W.2d 897 (1987). Every effort should be made to preserve these issues on statutory and due process grounds to begin limiting the unfettered ability of the prosecutor to put in evidence normally not allowed in a PFO proceeding.

Another option is to argue for a bifurcated penalty hearing with the TIS hearing held prior to the PFO hearing, with separate offers of proof for each decision. Indeed, Judge McDonald, concurring in Lemon, accepted the defendant's position that an additional bifurcation be held when a case concerned both TIS and PFO procedures.

At the very least, instructions and admonitions should be requested specifically guiding the jury on what evidence could be considered when making each of the 3 determinations required by the jury in a combined TIS/PFO hearing. While it would obviously be difficult for a jury to disregard certain evidence they have already heard, there is a chance that a strong admonition or guiding instruction will mitigate some of the prejudice to the PFO decision. If trifurcation and/or admonitions and instructions are an inadequate remedy, then a request to have a different jury make the PFO decision is an option.

One method to protect against the prejudicial effect of TIS evidence on the PFO hearing is to ask for discovery of the prosecutor's TIS evidence and then request that between the guilt-innocence determination on the underlying charge and the beginning of the bifurcated penalty hearing that the jury be voir dired to discover if they are familiar with any of the evidence the Commonwealth will seek to introduce. If they are, the Commonwealth should be forced to delete that evidence from his case or a new jury should be chosen if there are not enough alternatives to fill in for jurors who must be excused because of their knowledge. See KRS 532.080(1).



Additionally, Newton v. Commonwealth, Ky. App., ____S.W.2d____ (decided 8/19/88), makes it clear that an objection should be made to applying KRS 532.055 in a trial where the jury finds a lesser included offense that is only a misdemeanor. Also, the Commonwealth should never be allowed to bifurcate the trial of a misdemeanor even if it is appended to a felony trial. A defendant's criminal record and character are simply not relevant to the issue of what punishment is due a defendant who commits a misdemeanor. This statute is plainly limited to felony cases only. KRS 532.055(1). The jury should be instructed to determine guilt or innocence and penalty for any misdemeanors and then if appellant is found guilty of a felony count of the indictment, that count alone can be sent to a bifurcated hearing. In the event that the jury lowers the felony to a misdemeanor, the instructions should be written to require the jury to fix sentence after they determine guilt on any misdemeanor lesser included.

KRS 532.055 specifically states that it is not to apply to sentencing hearings pursuant to the capital sentencing statute. But the problem arises when a person is charged with capital murder and another felony as well. In Francis v. Commonwealth, 35 K.L.S. 7, 9 (1988), the defendant was charged with capital murder and other felonies as well as persistent felony offender. After the defendant was found guilty of murder and robbery, the court held a combined sentencing/PFO proceeding on the robbery and PFO charges. Subsequent to that proceeding, the court held a sentencing on the charge of capital murder. The Kentucky Supreme Court held that this procedure was incorrect and that in the future a capital penalty phase should always be conducted before the truth in sentencing/PFO phase. Because no sentence of death was imposed in the case, any error was deemed nonprejudicial. The Court declined to hold that the truth in sentencing statute could not be utilized at any phase of the capital trial. Rather, it held that the capital sentencing phase must precede the truth in sentencing phase.

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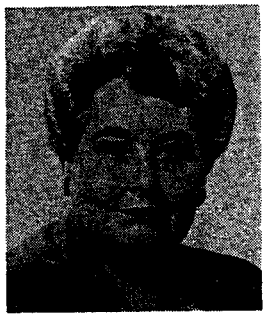
Frankfort, Kentucky 40601
(502) 564-8006

Ask Corrections



Betty Lou Vaughn

TO CORRECTIONS:

My client received a sentence of 180 years for the crime of capital murder. How would his parole eligibility be calculated?

TO READER:

Provided the crime was committed after July 15, 1986, the effective date of KRS 439.3401, he would have to serve 50% of the sentence, minus applicable jail credit. Certifications which identify those crimes which fall under the application of KRS 439.3401 and the length of time to serve for parole eligibility are furnished by Offender Records, upon requests by Commonwealth's Attorneys or defense attorneys.

TO CORRECTIONS:

My client received a 10 year sentence for burglary 2nd degree in one county and 5 years on a burglary 3rd degree in another county. The sentences were ordered to run consecutively for a total of 15 years. He was received by Corrections at the same time with both judgments in hand totaling 15 years. He has no jail credit. His 10 year sentence was reversed by the court after having served 18 months. The court will not be able to retry him on the 10 year sentence. Is all of the time served applied to the remaining 5 years on the burglary 3rd degree from the other county?

CERTIFICATE

I, Betty Lou Vaughn, certify that I am Administrator of Offender Records, Corrections Cabinet, Commonwealth of Kentucky, and that in my official capacity all offender records of the Corrections Cabinet are maintained and in my custody and that the attached are true and accurate copies of the calculation of parole eligibility under KRS 439.3401 for crimes identified by the Corrections Cabinet, Office of General Counsel.

Betty Lou Vaughn
Administrator of Offender Records

I, a Notary Public in and for the State of Kentucky do certify that the foregoing instrument was produced before me by Betty Lou Vaughn, Administrator of Offender Records, Corrections Cabinet, Commonwealth of Kentucky on this the 3rd day of November, 1988 and signed by her in my presence.

Notary Public, State of Kentucky

My commission expires October 28, 1989

FOR THE CRIMES OF MURDER, MANSLAUGHTER I, RAPE I, SODOMY I, ASSAULT I, KIDNAPPING (WHERE THERE IS SERIOUS PHYSICAL INJURY OR DEATH), ARSON I (WHERE THERE IS SERIOUS PHYSICAL INJURY OR DEATH), CRIMINAL ATTEMPT, CRIMINAL SOLICITATION, OR CRIMINAL CONSPIRACY TO COMMIT ANY OF THE PREVIOUSLY LISTED CAPITAL OFFENSES OR CLASS A FELONIES WHICH INVOLVE SERIOUS PHYSICAL INJURY OR DEATH OF THE VICTIM

COMMITTED AFTER JULY 15, 1986.

LENGTH OF TIME TO SERVE FOR PAROLE ELIGIBILITY--------MINUS JAIL CREDIT.

TO READER:

Yes, since the sentences ran consecutively.

TO CORRECTIONS:

What credit would my client receive if that 5 year sentence for the Burglary 3rd is received 1 year later rather than at the same time as the 10 year conviction for the burglary 1st degree which was received and dismissed?

TO READER:

His 5 year sentence would be recalculated as commencing on the date of final sentencing on the 5 year sentence, since the sentences ran consecutively. If the sentences ran concurrently he would receive credit for all time served on the 10 year and 5 year sentences.

SEND US YOUR QUESTIONS

All questions for this column should be sent to David E. Norat, Director, Defense Services Division, Department of Public Advocacy, 1264 Louisville Road, Perimeter Park West, Frankfort, Kentucky 40601. If you have questions not yet addressed in this column that you need a quick answer to, call either Betty Lou Vaughn at (502) 564-2433 or David E. Norat at (502) 564-8006.

BETTY LOU VAUGHN
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Forensic Science News

Jack Benton

BLOOD ALCOHOL ANALYSIS: CHEMICAL VS. INSTRUMENTAL

A REVIEW OF TWO BLOOD ALCOHOL ANALYSIS PROCEDURES

This is the first of a 4 part series by Jack L. Benton.

INTRODUCTION

Alcohol misuse and abuse has been a social problem for much of man's existence. With the advent of the automobile as an everyday part of our lives, this problem has become synonymous with automobile usage and has grown to tremendous proportions in terms of lost property and lives as a result of the drinking driver. Countless studies have been conducted and consequently revealed that a high percentage of multiple and single vehicle accidents occur, at least in part, due to alcohol abuse. It is estimated that approximately 50% of the casualties in motor vehicle accidents can be attributed to the effects of alcohol on both drivers and pedestrians. Because of the obvious seriousness of this problem, interest is high in identifying and eliminating the drinking driver from the roadway by the law enforcement agencies charged with this responsibility.

While the obvious need for the removal of the drunken driver from our roadways is undisputed, the rights of the accused must be protected from overzealous attempts at social reform. It is therefore the intent of this 4 part article to inform the judiciary, prosecutors, defense lawyers, and the general citizenry of two of the most popular blood alcohol procedures, as aid in order that they protect the innocent.

A great deal of time, energy and research has been exhausted in an effort to define, 1) the legal amount of alcohol necessary to produce intoxication, and 2) produce a scientifically sound method by which to measure this value. As alcohol intoxication deals with central nervous system depression, thereby affecting the brain, a means of monitoring this level was required. Blood alcohol percent levels became the accepted correlation between alcohol concentrations and the resultant central nervous system depression when it was discovered that alcohol levels in the blood generally exist in a 1 to 1 ratio with the alcohol level in the brain.

Therefore, the direct analysis of blood for alcohol content has long been considered by the scientific community as the most reliable method for the determination of alcohol levels and their subsequent effects on an individual's[1] sobriety. Certain obvious disadvantages in the removal of blood from a living victim have made this procedure less popular, however, than breath or urine testing for alcohol content. Aside from the laboratory complexities of submitting to a blood test, other disadvantages also exist.[2]

TAKING THE BLOOD SAMPLE

The taking of a blood sample is generally inconvenient, since most police agencies do not have the facilities for taking such samples readily available. Suspects must be taken to a doctor's office, clinic or hospital; and a physician, qualified technician, registered, professional or licensed vocational nurse must be located who is willing to withdraw the blood specimen. Adequate space must be available at the law enforcement facility, and containers for the specimen must be provided. The containers themselves present a problem in that care must be taken to assure they are properly cleaned and contain adequate preservative and anticoagulant to attempt to keep the blood specimen in a proper condition for analysis. The blood specimen must be properly marked and sealed to insure the integrity of the chain of custody. The arresting officer must mail or hand deliver the specimen to the laboratory that is to conduct the analysis.

The taking of a blood sample is not only inconvenient, it is sometimes an unpleasant experience for the person from whom the sample is removed. Most people dread the thought of having blood taken from their arm, and often the dread c the experience is more painful than

the actual insertion of the needle into the vein.

A major complaint about blood alcohol examinations is the relatively long period of time required to get a result back from the laboratory. When compared to the extremely quick response time of breath analysis, the blood alcohol examination seems especially long. It ordinarily takes several days for a submitted specimen to be worked and a report issued; whereas with breath alcohol analysis, the arresting officer has his answer within a maximum of 2 hours after the suspect has consented to give the specimen.

DUI penalties in Kentucky

Under current Kentucky law, these are penalties for persons convicted of driving under the influence of alcohol with a blood alcohol level of at least .10 percent:

1st Offense
- $200-$500 fine* and/or 48-hours-30 days in jail*
- 2-30 days community service in lieu of fine/jail if no injury
- License suspended six months* (30 days if education program completed*)
- $150 service fee*
- If driving on license suspended for DUI, $250 fine* and/or 90 days in jail* and license revocation time is doubled

2nd Offense
- $350-$500 fine*
- 7 days-6 months in jail*
- License suspended one year*
- $150 service fee*
- If driving on license suspended for DUI, $500 fine*, and/or 1 year in jail* and license revocation time is doubled
- Mandatory rehabilitation for 1 year
- Optional 10 days-6 months community service

3rd Offense
- $500-$1,000 fine*
- 30 days-1 year in jail*
- License suspended 2 years*
- $150 service fee*
- If driving on license suspended for DUI, $10,000 fine and/or 1-5 years in jail* and license revocation time is doubled
- Mandatory rehabilitation for 1 year
- Optional 10 days-6 months community service

*Cannot be probated

The expense of blood alcohol analysis is usually relatively high due to the number of man hours of labor involved. Not only must one secure the professional personnel for the taking of the blood, but also the time spent in the analysis by a properly trained chemist must be considered. Often the chemist is involved in the preparation of the blood alcohol sample tubes as well as the calibration of the scientific instrumentation used in the examination. This time might not be actually charged to the analysis. However, it is time spent and must ultimately be considered in the relative efficiency of the laboratory operation.

The precision of the direct blood analysis should be of primary concern when one is dealing with the future of a person suspected of driving while intoxicated.[3] A crucial aspect of direct blood analysis is at the very outset of the procedure; the taking of a proper sample. This sample ought to be taken following very careful guidelines and safeguards, to insure that no alcohol from an outside source contaminates the specimen withdrawn from the suspect. Notwithstanding, aside from a statutory directive which delineates persons who can take a blood specimen and unlike breath testing where written guidelines, procedures and administrative regulations mandate how breath sampling is to occur, there are no statutory, administrative or any other guidelines as to how law enforcement ought perform alcohol blood concentration analysis. Contamination may be prevented by eliminating alcohol from the process of drawing the blood sample. The use of alcohol swabs to cleanse the area from which a specimen is to be drawn should be discouraged and an aqueous solution of benzal-konium chloride or some other suitable aqueous disinfectant should be substituted. Sometimes a technician will not have proper disinfectant on hand and alcohol swabs will be substituted.[4] In such a case, the alcohol should be given adequate time to evaporate before penetrating through the skin with the syringe needle and drawing the specimen. Research indicates that a very small blood alcohol increase results from using alcohol sterilization material[5], however, it is necessary to do everything to prevent errors increasing the blood alcohol content.

Alcohol swabs should never be allowed to make contact with the needle being used to withdraw blood, as this could contribute to an erroneously high alcohol concentration. Cleaning the outer surface of the syringe/needle may give rise to serious errors since the alcohol from the cleaning procedure may fill the hollow needle, be drawn into the syringe, and later analyzed as alcohol present in the blood of the tested individual.

Generally, blood alcohol specimens are not analyzed for days after they have been collected. Therefore, provisions must be made to ensure that the specimen does not decompose and produce alcohol and/or other putrefaction products that could produce erroneous[6] results.[7] Blood alcohol tubes should contain an anticoagulant and a preservative, placed in them to insure that the specimen remains in a proper condition for analysis. Sodium fluoride is a commonly used preservative and may be used with sodium citrate which acts as an anticoag-

ulant. Maintaining the specimen under refrigeration or maintaining it in a moderately cool atmosphere helps keep the specimen in good condition.

The proper sealing and labeling of a blood sample should be of primary concern to the defense attorney, as well as the State.[8] After the specimen has been properly collected, it should be sealed and identified with the name, date, time and location. The arresting officer should sign the label on the blood tube and should maintain control of the specimen until it is submitted to the laboratory. The nurse, doctor or qualified technician should date and initial the specimen container label so that it can be ascertained if proper procedure was followed.

Laboratory personnel who are charged with analyzing blood alcohol samples should be sure to note the name of the individual on the blood sample tube, and compare it to the name on the submission form or incident report. Any discrepancy between the submission form and blood tube should be noted and any unusual circumstances relating to the sample tube (leaking, improper seal, etc.) should be reflected in the analyst's file.

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FOOTNOTES

[1]MOSES, SCIENTIFIC EVIDENCE IN CRIMINAL CASES (1973) 239, MOSES also states at p. 239 and 294, that:

The most reliable chemical test for intoxication is a direct analysis of the brain tissue; but its use is obviously confined to corpses, before decay and putrefaction. So is the analysis of spinal fluid. The other tests suitable for use of living persons are limited to analysis of the blood, urine and the breath. Of these practical methods, a direct analysis of the blood is considered the most reliable. The main limitations to this testing method are the necessity of having a doctor or qualified medical technician obtain the sample under sterile conditions, the evidentiary requirement of preserving the chain of evidence, and the fact that many persons are hesitant to consent to having a needle stuck in their veins. Because of these and other limitations, blood analysis as a test for intoxication has not been as widely used in the United States as, for example, breath tests.

See generally SAFERSTEIN, FORENSIC SCIENCE HANDBOOK (1982) [hereinafter cited as SAFERSTEIN].

[2]MOSES at 239 states:
The purpose of chemical tests for intoxication is not to determine how much alcohol a subject has drunk, but rather to determine how much alcohol has reached to body fluid (blood) which carries it to the brain where it disrupts the brain's normal function. Taking into account the numerous laboratory methods for analysis of blood and urine to determine the presence of alcohol and to determine its concentration, no test has gone unquestioned with regard to its accuracy and specificity.

Chemical determination of blood alcohol levels by analysis of blood or urine is quite complicated. Even when the test is valid and accurate in principle, error is possible whenever the analyst is careless or incompetent, or if the specimen was contaminated at the time it was taken, or subsequently.

[3]See generally, Bradford, "Concepts and Standards of Performance in the Technique of Alcohol Analysis of Physiological Specimens" from the Proceedings of the Symposium on Alcohol and Road Traffic, Indiana Center for Police Training, Indianapolis, Indiana (1958) [hereinafter cited as Bradford]. See generally also, SAFERSTEIN.

[4]See Kaufmann v. State, 632 S.W.2d 685 (Tex. App. - Eastland 1982) Use of a solution containing alcohol to cleanse skin before blood test administered to motorist did not make result of test inadmissible as a matter of law in prosecution for misdemeanor offense of driving while intoxicated, but merely affected weight to be given result obtained.

[5]The degree of error which would result through use of alcohol sterilization is dependent on: the strength of the alcohol used; the wetness of the area sterilized at the time of blood withdrawal; and, the time elapsed between the sterilization and the taking of the blood.

[6]See generally Fitzgerald and Hume, "Erroneous Expert Opinions in the Civil and Criminal Trial of Intoxication Cases; Widmark Revisited," - 7 #10 The Champion 6, (1983).

[7]See generally ERWIN, DEFENSE OF DRUNK DRIVING CASES (1984), chapters 15 and 17.

[8]Mersiovshy v. State, 638 S.W.2d 527, 529 (Tex. App. - Tyler 1982) and Gamez v. State, 352 S.W.2d 732, 735 (Tex. Cr. App. 161).

Cases of Note...In Brief

Ed Monahan

SEQUESTERING DEFENDANT PER SE REVERSIBLE ERROR

State v. Mebane
529 A.2d 680 (Conn. 1987)

After the prosecution rested its sale of heroin case, the defendant testified. During a recess during cross-examination of the defendant, the prosecutor convinced the trial judge to keep the defendant and his counsel from talking since there was more cross to be done.

The Connecticut Supreme Court readily found that preventing the defendant from talking to his lawyer during the recess violated the fundamental constitutional right to assistance of counsel.

Significantly, the court also held that the error was not subject to being harmless: "We believe that a per se rule of automatic reversal more properly vindicates the denial of the defendant's fundamental constitutional right to assistance of counsel guaranteed by the sixth amendment." Id. at 685.

JAIL CREDIT/INCOMPETENCE

Tal-Mason v. State
515 So.2d 738 (Fla. 1987)

The defendant was found mentally incompetent to stand trial. He was sent to the state forensic hospital. 5 years and 27 days later he was found competent. He then pled guilty and was sentenced to life.

The Court held that the time the defendant spent in the state mental institution awaiting competence was time the defendant was entitled to jail credit for on his sentence since "...commitment for incompetence... infringes upon liberty interests in a particularly coercive manner." Id. at 739.

DATE OF SEX OFFENSE

Tommy Turner v. Commonwealth
Ky., (June 6 1988)
unpublished

In 1984 the defendant was charged with sodomy of his son on or about November 10, 1982. At defendant's first trial, the victim testified that he was sodomized shortly before or after Christmas, 1982. The defense was that the defendant could not have committed the crime since he was incapable of having an erection in November and December, 1982 due to a tumor on his spinal cord.

The conviction on the first trial was reversed by the Kentucky Supreme Court. At the second trial, the prosecutor in his opening statement revealed that the victim would say that he was sodomized in late August, 1982. The defense's motion for mistrial due to a variance between the indictment and evidence was overruled. The Court held on the second appeal that reversal was required: "Although we recognize the extreme difficulties inherent in specifying with adequate accuracy the dates and times of sexual assaults against children, when only the children themselves can tell the story, and have held that in an ordinary case of child sexual abuse, the specific dates and times become much less important, Hampton [v. Commonwealth, Ky., 666 S.W.2d 737, 740 (1984)], we will not allow the rights of the accused to be trampled in an attempt to ease the burden of the prosecution. In Hampton, we held that time is not vital unless it misleads the defense. Id. The case at bar is a perfect example of an attempt by the prosecutor to mislead the defense. The Commonwealth's attorney even admitted to the trial court that, "I certainly don't deny it looks fishy." Indeed it does "look fishy". From the evidence of when the crime was actually committed, presented at the first trial, the doctor's testimony cast serious doubts upon appellant's physical ability to have performed the sodomy. However, changing the date of the alleged sodomy, so that it was farther away from appellant's incapacity, without notifying appellant of the change, worked a perfect ambush in the second trial, and heralded the return of trial by surprise.

Although the Commonwealth contends that any error was waiver through appellant's failure to request a bill of particulars, RCr 6.22, there could be no more complete bill of particulars than the entire first trial which misled the ap-

pellant to believe he must defend against the accusation of a November crime.

Therefore, since appellant was misled in his defense by the sudden and extreme variance between the indictment and the proof in this case, we hold that it was error for the trial court to allow the changed date without granting adequate notice to appellant."

DV - OVERWEIGHT TRUCK
Samuel Rader v. Commonwealth
Ky.App., (May 13, 1988)
unpublished

The Court reversed a conviction for operating an overweight tandem axle truck.

"The Commonwealth has the burden of proving every element of a case against a defendant beyond a reasonable doubt. KRS 500.070(1). In cases of this nature, the very essence of the offense entails a combination of proof going to both weight and axle separation. State v. Gribble, 24 Ohio St. 2d. 85, 263 N.E.2d 904 (1970). A failure to establish either of these two essential elements will be fatal to the prosecution's case. State v. Gribble, supra, p. 905.

The Commonwealth failed to prove the distance of axle separation. A number of witnesses tossed around the term "tandem axle vehicle, but Webster's New Collegiate Dictionary defines tandem as a vehicle (as a motor truck) having close-coupled pairs of axles. That definition uses the weasel-word of close-coupled. As with all weasel-words, the term is relative and may be used to describe the truck in general terms, not indicating specificity of measurements. It is incumbent upon the Commonwealth to prove beyond a reasonable doubt each and every element of the charge."

OPINION THAT CHILD TELLING TRUTH/CHILD SEXUAL ABUSE SYNDROME/COLPOSCOPE
William B. Campbell v. Commonwealth
Ky., (May 19, 1988)
unpublished

The Court reversed the first degree rape conviction and life sentence since the trial judge admitted Lane Veltkamp's testimony regarding the child sexual abuse accommodation syndrome and since the trial judge allowed Veltkamp to state his opinion as to the child's truthfulness.

Also, the Court reversed since the trial judge erred in permitting the victim to testify outside the presence of the defendant, and without being sworn. The 8 year old prosecutrix testified live via TV in a room separate from the defendant.

In his concurring opinion Justice Lambert stated that Dr. Reva Tackett's testimony on her use of the colposcope was erroneously admitted since the use of the device for this purpose was not commonly accepted by the medical community and is thus inadmissible under Frye.

INVOLUNTARY GUILTY PLEA
Ernest Grubbs v. Commonwealth
Ky.App., (April 29, 1988)
unpublished

In an opinion written by the Chief Judge, the Court of Appeals held that the defendant's guilty plea to robbery was not knowingly, voluntarily and intelligently entered since his counsel was defective in advising him that he could be convicted of both robbery and assault.

CRIME STOPPERS CALLS IMPERMISSIBLE EVIDENCE
Timothy Whalen v. Commonwealth
Ky.App., (April 29, 1988)
unpublished

The defendant was convicted of theft in Franklin County. The Commonwealth's first witness was a police officer who testified about his conversation with an anonymous person who called him via the "crime stoppers line" giving him very detailed information regarding the theft and fingering the defendant.

The Court held that this information could not be introduced since it prohibits a defendant from his constitutionally guaranteed right to confront and cross-examine.

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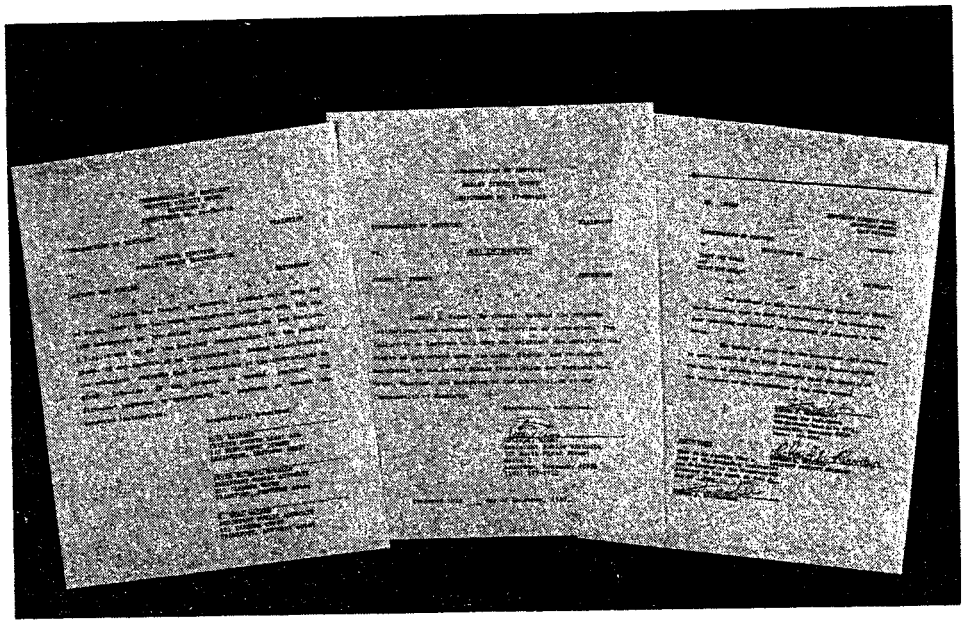
From a lawyer who built a practice on unswerving loyalty to clients:

"They may not always be right, but they are never wrong."

Percy Foreman
June 21, 1902 - Aug 25, 1988

Instructions Manual



INSTRUCTIONS COLLECTED, CATEGORIZED, LISTED

The Department of Public Advocacy has collected many instructions filed in criminal cases in Kentucky, and has compiled an index of the categories of the various instructions in a 7 volume manual. Each instruction is a copy of a defense instruction filed in an actual Kentucky criminal case. They are categorized by offense and statute number.

COPIES AVAILABLE

A copy of the index of available instructions is free to any public defender or criminal defense lawyer in Kentucky. Copies of any of the actual instructions are free to public defenders in Kentucky, whether full-time, part-time, contract or conflict. Criminal defense advocates can obtain copies of any of the instructions for the cost of copying and postage.

HOW TO OBTAIN COPIES

If you are interested in receiving an index of instructions, or copies of particular instructions, contact:

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MANUAL IN FIELD OFFICES

We have a complete set of all instructions in each of DPA's field offices, including Lexington, Louisville, Boyd County and Covington. Call the director of those offices for access to their copy of the file.

ONLY SAMPLES: UPDATE AND INDIVIDUALIZE

Of course, the instructions are meant only as samples of instructions by other attorneys in other individual cases. Each instruction must be completely reviewed, updated and individualized for your particular client.

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The manual includes tendered and given death penalty instructions in most of the death penalty cases tried in this state. They are categorized alphabetically by the client's name.

OTHER MANUAL ENTRIES

There are also articles on instructions, and an instruction bibliography.

SEND US YOUR INSTRUCTIONS

The instructions file is only as good as the instructions we receive from attorneys practicing criminal defense work throughout the state of Kentucky. Please send us any instructions that you think should be included in the file in the future. This concept of collecting and disseminating good instructions only works well if each of you give us your instructions to share with others. We are in the process of supplementing the manual.

OTHER SOURCES

Do not forget the many good articles on instructions in The Advocate, as listed in The Advocate cumulative subject index.

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Stewart Continued from Page 2

side effects - some irreversible.

Children's services are a particular focus of the branch. Bill was recently involved in a case at Children's Treatment Center in Louisville which received media attention. He sees the overly broad terms defined by the Juvenile Code, KRS 645.040(7), which allows commitment for behaviors he calls "the definition of a typical adolescent," as part of the problem. He dislikes the potential for abuse of the Code to create a turnkey function. He says there are very few "crazy" kids who have experienced psychotic breaks - "most are explosive or acting out." Parents, unable to deal with the child, can "check" the child into commercial or private hospitals.

Bill has a clinical psychology masters degree (1975) from West Georgia College, Carrolton. His undergraduate degree, in psychology, is from Centre College. In November 1988, Bill will wed Mary Davidso. They'll live in Lexington in their newly renovated house.

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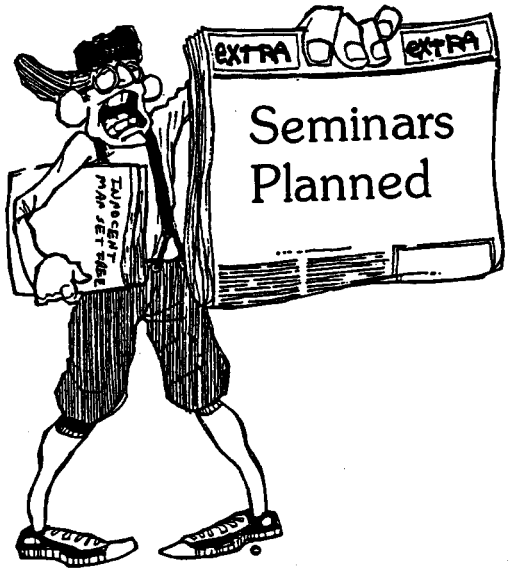

December 9, 1988- December 10, 1988	**KACDL Seminar** Capital Plaza Frankfort, KY
January 2, 1989- January 14, 1989	**NCDC Trial Practice Institute** Macon, GA
March 13, 1989- March 15, 1989-	**DPA Death Penalty Seminar** Barren River State Park
June 4, 1989- June 6, 1989	**17th Annual DPA Seminar** Holiday Inn, N. Lexington, KY
October 14, 1988	**DPA Mental Retardation in the Criminal Justice System Seminar** Harley Hotel Paris Pike Lexington, KY
November 29, 1988- December 3, 1988	**DPA Trial Practice Institute** Holiday Inn Hurstbourne Lane & I-64 Louisville, KY

The Sentencing Project and the Practicing Law Institute are sponsoring a National **Conference on Sentencing Advocacy** on January 27-28, 1989 in Washington, D.C. The conference will feature sessions on techniques of sentencing advocacy, policy reform strategies, and demonstrations of courtroom sentencing practices. For further information and registration, contact The Sentencing Project, 1156 15th Street, N.W., Suite 520, Washington, D.C. 20005; (202) 463-8348.

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